163 US 101

TRANSCRIPT OF RECORD.

163-101

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 718.

JAMES MURRAY, ALIAS "GREASY JIM," PLAINTIFF IN ERROR,

vs.

THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED AUGUST 24, 1895.

(16008.)

quences. Not so with Egeland. He was expressly directed and commanded to get off then and there. It was not left a matter of choice with him. If Egeland had been told to get off or stay on the car as he pleased, then we would have had a case similar upon the facts, to the Jones Case. Jones knew all about the hazzards in riding on the pilot. He had time to go either in the caboose or onto the pilot, and hence a full opportunity to reflect to make his choice. Egeland never had gotten off from a train in motion. The command to "*get off now*" was suddenly given in a peremtory manner and promptly executed. Egeland was an old man, a foreigner, accustomed to obey promptly; hence the order interfered with his free agency, and diverted his attention from the danger of jumping, and in all probability created a confidence that the attempt could be made in safety.

HENRY J. GJERTSEN,

Of Counsel of Defendant in Error.

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1 State of Louisiana, parish of Orleans, criminal district court for the parish of Orleans, Section B, Hon. James C. Moise, judge.

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Finding of grand jury.

State of Louisiana, criminal district court for the parish of Orleans, Section A, Hon. J. H. Ferguson, judge.

The grand jurors for the State of Louisiana, duly impannelled and sworn and charged to inquire in and for the body of the parish of Orleans, came into open court, there being then and there present thirteen of their number and a quorum, and upon their oaths in open court and through their foreman presented to the court the following bill of indictment, the same being properly endorsed and signed by the said foreman, to wit:

No. 22494. State of Louisiana versus Jim Murray, alias Greasy Jim. Indictment for murder. A true bill.

(Signed) ROBT. B. JONES,
Foreman of Grand Jury.

NEW ORLEANS, *October 30th, 1894.*

Returned into open court and recorded and filed October 30th, 1895.

(Signed) F. J. LETTEN, *Minute Clerk.*

2 The said bill of indictment presented to the court as aforesaid was received by the court and ordered filed by the clerk with his endorsements of filing thereon:

And, on motion of the district attorney, the court ordered capias to issue commanding the criminal sheriff to arrest the body of the defendant named in the said indictment, and hold him in custody under the charge preferred against him in the aforesaid indictment.

Indictment.

Returned into open court, recorded and filed, October 30th, 1894. Section B, Hon. J. C. Moise, judge.

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

THE STATE OF LOUISIANA,
Parish of Orleans, ss:

Criminal district court for the parish of Orleans.

The grand jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the parish of Orleans, in the name and by the authority of the said State, upon their oath, that one Jim Murray, alias

Greasy Jim, late of the parish of Orleans, on the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms, in the parish of Orleans aforesaid, and within the jurisdiction of the criminal district court for the parish of
3 Orleans, did feloniously, wilfully, and of his malice aforethought, kill and murder one Michael Cotter, contrary to the form of the statute of the State of Louisiana, in such cases made and provided, and against the peace and dignity of the same.

(Signed) CHARLES A. BUTLER,
District Attorney for the Parish of Orleans.

(Endorsement:) No. 22494. State of Louisiana vs. Jim Murray, alias Greasy Jim. Indictment for murder. A true bill. Signed, Robt. B. Jones, foreman of grand jury. New Orleans, Oct. 31st, 1894. Returned into open court, recorded and filed, October 30, 1894. Signed, F. J. Letten, minute clerk.

Arraignment.

[Extract from the minutes.]

THURSDAY, *December 13th, 1894.*

Section B, Hon. James C. Moise, *Judge.*

THE STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

4 The defendant, Jim Murray, alias Greasy Jim, in person being placed at the bar of the court in custody of the sheriff, was then arraigned on the charge preferred against him in the above indictment, after hearing the said indictment read, together with the finding of the grand jury therein, and the endorsement thereon. The accused herein then pleaded "not guilty," reserving the right to withdraw said plea.

The court ordered his plea recorded and the accused remanded to await further proceedings.

Challenge to grand jury, filed January 10th, 1895.

THE STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Charge, murder.

Section B, criminal dist. court.

Now into court comes Thomas F. Maher, counsel for accused, and suggests to the court that the grand jury which indicted him, as prepared by the jury commissioner of this parish, is not a legally constituted body, and that he desires to challenge the venire from which said body was selected by this court as the grand jury on the following grounds, to wit:

That the jury commissioners of this parish, in qualifying and selecting the citizens of this State and the United States as jurors, did not conform

with article 116 of the constitution of 1879 of Louisiana and the acts of the legislature in conformity therewith, and the 13th, 14th, and
5 15th amendments of the Constitution of the United States.

That the jury commissioners of this parish, in selecting and qualifying the citizens who composed the grand jury which indicted the accused, did not follow the forms of law, and violated article 188 of the constitution of 1879 of the State of Louisiana, and did discriminate in favor of one class of citizens to the prejudice and injury of the accused, a man of color, in selecting and qualifying the names of the citizens placed in the jury wheel of this parish, from which said venire the court selected the grand jury, in violation of the 14th amendment to the Constitution of the United States. That the jury commissioners of this parish violated article 116 of the constitution of 1879, in the selection and qualification of the names in the jury wheel from which the venire was drawn, and from which said venire the court selected the grand jury which indicted the accused, in this, that the said jury commissioners excluded one class of citizens possessed of all legal as well as intelligent qualifications to serve as jurors.

And the said jury commissioners discriminated against citizens of the race and color of the accused, on account of race, color, and previous condition of servitude, in violation of the 14th amendment of the Constitution of the United States.

Defendant prays that the court maintain his challenge, and decree that the presentment of the grand jury in this case as being null and void, and that the indictment be quashed.

(Signed) THOMAS F. MAHER,
Atty. for Accused.

6 (Endorsements:) January 10th, 1895. Filed subject to argument on the face of the papers, at a time to be hereafter fixed by the State. Signed, A. J. Desmond, minute clerk.

Motion for a subpœna duces tecum on F. C. Zacharie. Filed Jan. 10th, 1895, subject to orders.

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court, Section B.

On motion of Thomas F. Maher, attorney for accused, and upon suggesting to the court that it is necessary and material as evidence to support his challenge to the grand jury in the above entitled and numbered cause, that Francis C. Zacharie, registrar of voters of this parish, furnish the total number of voters (in figures) registered in this parish; the total number of white voters registered; the total number of colored voters; the total number of white voters who can sign their names; the total number of colored voters who can sign their names, at the closing of the registration office of this parish previous to the last Congressional election, held on Nov. 6th, 1894.

It is ordered and commanded by the court that Francis C. Zacharie, registrar of voters of this parish, furnish the total number of voters registered in this parish; the total number of registered white voters; the total number of registered colored voters; the total number
7 of white voters who can sign their names, and the total number of colored voters who can sign their names, at the close of the registration office of this parish previous to the last Congressional election, held on 6th of November, 1894.

Filed subject to orders. Signed, A. J. Desmond, minute clerk.

8 *Motion for a subpœna duces tecum on jury commissioners. Filed January 10th, 1895, subject to orders.*

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Section B.

On motion of Thomas F. Maher, attorney for accused, and upon suggesting to the court that it is necessary and material as evidence to support his challenge to the grand jury, in the above entitled and numbered cause, that E. R. Chevalley, E. O. Malacon, and Louis Arnault, jury commissioners of the parish of Orleans, furnish the names of thirty-five hundred citizens, as well as their addresses or residences, who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of one thousand citizens who they qualified and placed in the jury wheel, from which the grand jury was drawn which indicted the accused.

It is ordered by the court that a subpœna duces tecum issue to E. R. Chevalley, E. O. Malacon, and Louis Arnault, jury commissioners of this parish, ordering and commanding them to furnish the court, on the trial of the challenge to the grand jury, the names and residences of the thirty-five hundred citizens who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of the one thousand citizens who they qualified and placed in the jury wheel, from which the present grand jury was drawn.

(Endorsement:) Filed subject to orders. Signed, A. J. Desmond, minute clerk.

9 *Trial of challenge to array of grand jurors and notes of evidence.*

[Extract from the minutes of Feb. 2nd, 1895.]

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

Section B, criminal district court, Hon. James C. Moise, judge, presiding.

The defendant, Jim Murray, alias Greasy Jim, in person being placed at the bar of the court in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq., and the hearing of the challenge to the grand jury by whom the above indictment was found and presented, together

with motions for subpœnas duces tecum, having been for this day fixed: Thereupon the State filed in evidence, and as part of the record herein, the evidence taken before Section A of this court in the case of the State of Louisiana versus George Heard, No. 22325, on the challenge to the grand jury, to which counsel for defendant announced no objections, and then filed in evidence herein assignment of first errors and of bills of exceptions.

Second. The return of the registrar of voters to the subpœna duces tecum.

Third. And the judge's reason for overruling the challenge to the grand jury, to which the State announced no objections.

The State then read to the court the return of F. C. Zacharie,
10 registrar of voters, to the writ of duces tecum in the case No. 22325. Counsel for defendant herein then presented to the court his motion for a subpœna duces tecum herein pending, which was overruled, to which ruling of the court counsel for defendant excepted, and with consent of the court reserved the right to file a bill of exceptions.

The State then admitted that the grand jury, of which Mr. Robt. B. Jones was foreman, were all white persons, and were selected according to law, and that the entire list of 3,500 names of persons examined by the jury commissioners in September, 1894, to make up the jury wheel under the new law, and examined by them to qualify for jury service, is not complete and can not be produced.

Louis Arnault was then sworn and examined by counsel for defendant, during which it was admitted that the jury commissioners, being placed on the witness stand and asked to give the names and addresses of a single colored man, answered they were unable to give the name of a single colored or white man.

Whereupon the hour of 12 o'clock, this Saturday, 2nd February, 1895, having arrived, further consideration of the matters herein pending was ordered continued until Tuesday, Feby. 5th, 1895, at 10.30 o'clock a. m., and the accused was remanded.

11 No. . Criminal district court, Parish of Orleans, Section A. Hon. James H. Ferguson, judge.

STATE OF LOUISIANA)
vs.
GEORGE HEARD.)

In open court, on Friday, November 16th, 1894, testimony and notes of evidence taken on the trial of the challenge to the array of grand jurors, filed by the defendant.

Objection to the return of the registrar of voters, to subpœna duces tecum.

Mr. MAHER (of counsel for mover) objects to the return of the registrar of voters.

The DISTRICT ATTORNEY. The State is willing to admit that there are 16⅔rds per cent colored voters registered in the parish of Orleans, and that 12½ per cent of that amount of the total colored vote can sign

their names; that was the proportion made by the registrar of voters after the general election of 1892, and that there has been no general election since 1892.

(Ruling of court on objection.)

The court rules that the return of the officer, the registrar of voters, complies with the order of the court for the reasons therein stated.

(Exception by mover.)

The defendant excepts to the ruling of the court on the following grounds:

That a statute of this State makes the registrar of voters a public officer; that the registration books of this parish are public documents, and to this objection the defendant adds the return of the registrar
12 of voters to the subpœna duces tecum issued by this honorable court.

Testimony offered by mover.

M. J. KING, a witness called on the part of the mover, who, being first duly sworn by the minute clerk, testifies as follows:

Examination by Mr. MAHER:

1. Q. What official position do you occupy?

A. I am a deputy to the criminal sheriff.

2. Q. Is it one of your duties to serve summons for the jury commissioners?

A. Yes, sir.

3. Q. Did you serve any summons for the jury commissioners in the month of September of this year?

A. I did.

4. Q. Why did you serve those subpœnas?

A. Why?

5. Q. Well, did you serve any of the subpœnas for the jury commissioners from which the grand and petit juries were organized for the month of October?

A. I have served jury commissioners' notices in the month of September.

6. Q. For this last grand jury?

A. I don't remember whether there are any of them among them or not.

7. Q. In those subpœnas you received from the jury commissioners—you stated you served them—were there any for colored men?
13 A. Well, I don't know who lives in a house when I leave them there.

8. Q. Did you serve any of them personally?

A. I did.

9. Q. The personal service you made on those people—were any of them colored people?

A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

10. Q. What proportion of the subpœnas served by you were served personally?

A. I can't say now.

11. Q. Have you at any time refused to serve a subpœna on a colored person when you found him?

A. No, sir.

12. Q. Do you remember how many of the subpœnas that you had were issued for colored people?

A. I remember one that I had an attachment for.

13. Q. Do you remember what proportion of the subpœnas that you had in your possession were for colored people?

A. I don't know.

14. Q. You can't state?

No, sir.

By Mr. MAHER:

15. Q. You have other duties to perform outside of serving jury commissioners' notices?

A. Yes, sir.

16. Q. How long have you been attached to the criminal sheriff's office?

A. Since 1892.

17. Q. During that time have you observed any talesmen, colored talesmen, drawn on juries?

(Objection.)

14 The DISTRICT ATTORNEY. We will have to object.

The COURT. The inquiry should be restricted to the present grand jury drawn in the month of September of this year. Objection sustained.

18. Q. In those notices you got you stated you served notices to people to serve as jurymen?

A. No, sir; only notices to appear before the jury commissioners.

M. J. MCFARLAND, a witness called on the part of the mover, being duly sworn by the minute clerk, testified as follows:

Examination by Mr. MAHER:

1. Q. What is your official business?

A. Deputy criminal sheriff.

2. Q. In your capacity as deputy sheriff, did you have occasion to serve any notices issued from the jury commissioners for the organization of the grand and petit juries?

A. No, sir; only jury notices.

3. Q. Jury notices emanating from where?

A. From the clerk's office.

4. Q. Do you remember the number of them, Mr. McFarland?

A. Maybe fifteen or twenty.

5. Q. Were any of those notices issued to any colored people?

A. Not that I know of; none of those I served personally.

6. Q. How many did you serve personally?

A. About four out of fifteen.

7. Q. Did you know the people who lived in the houses where you left the notices?

A. No, sir.

15 8. Q. Do you know whether they were colored or white?

A. No, sir.
9. Q. Did any of the parties fail to answer that you served notices on?
A. I don't think any failed to report in September.
10. Q. Did you see any nigger among them?
A. I would not know them if I saw them.
11. Q. Did you hear their names called?
A. Not at all times.
12. Q. Well, did you see the number of jurors that were summoned in court to make up the grand and petit juries for the month of October?
A. I saw the people who were summoned, but how many I don't know.
13. Q. You were in and out of the court room?
A. Yes, sir.
14. Q. Was any colored men among them?
A. I didn't pay any attention.

By the DISTRICT ATTORNEY:

15. Q. You say you don't know whether you had any subpœnas for colored men or not?
A. I can't say.
16. Q. You did not discriminate against colored men in the service of notices?
A. No, sir.
17. Q. You don't know whether or not there were any colored men summoned here for the month of October from which the present panel was made up?
A. No, sir; I don't.

15½ JOHN MCNEIL, a witness on the part of the mover, who, being sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. What is your official position?
A. Deputy criminal sheriff.
2. Q. As criminal deputy sheriff, did you have occasion during the month of September to serve any notices for the jury commissioners?
A. Yes, sir.
3. Q. Did you serve any colored men?
A. I can't say whether they were colored or not.
4. Q. About how many did you have?
A. I can't exactly say how many.

PETER LEMM, a witness on the part of the mover, who, being sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. What official position do you occupy?
A. Deputy criminal sheriff.
2. Q. Did you have occasion during the month of September to serve any notices or summons for the jury commissioners of this parish?
A. For the month of September, I believe I did.
3. Q. For the jury commissioners?
A. Yes; that was about the time the wheel was being filled.
4. Q. About how many did you have; do you recollect?

A. I can't say.

5. Q. Were there any colored people among them?

16 A. Not that I know of.

6. Q. How many of them did you serve personally?

A. I can't tell you that, either.

7. Q. Did you serve any colored men with a notice to appear before the jury commissioners?

A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

8. Q. You do not know how many you served personally?

A. No, sir.

9. Q. You don't know how many persons of those you had might have been colored men?

A. No, sir.

10. Q. You didn't discriminate against colored men, did you?

A. No, sir.

11. Q. Did you serve any subpœnas for October last?

A. Yes, sir.

12. Q. Did you have any colored men in that service?

A. No, sir.

13. Q. Try and recollect if you didn't serve a colored man with an attachment?

A. Yes, sir; I brought him in on an attachment, but he was served by Mr. Merrideth.

14. Q. Then, it is a fact that a colored man was brought in under an attachment?

A. Yes, sir.

15. Q. Do you remember seeing a party summoned here—a colored man—who is connected with a colored newspaper called the Standard?

A. I remember seeing him here.

17 16. Q. Don't you remember him being here during the month of October and being excused from service by Judge Moise?

A. I can't say.

LOUIS BOISIDORE, a witness called on the part of the mover, who, being first duly sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. Did you serve notices during the month of September for the jury commissioners to make up the grand and petit juries for the month of October?

A. Yes, sir; I served summons for the wheel for the jury commissioners.

2. Q. Do you remember the number?

A. Since the 12th of September I served between 60 and 75 notices.

3. Q. Is it within your recollection that you served any colored persons?

A. I didn't serve any niggers. Among many white persons there are some colored people, but I don't know whether they were white or not.

4. Q. They appeared to you to be white?

A. They registered as white.

5. Q. How many personal services did you make?
A. Personal?
6. Q. Yes, sir.
7. Q. Mr. DISTRICT ATTORNEY. For the October jury?
A. I can't say. To fill the wheel on the first jump I served fifteen personally.
8. Q. (By Mr. MAHER.) Fifteen out of sixty?
18 A. Yes, sir; but the balance of them I didn't keep a memoranda of.
9. Q. Out of those fifteen that you served personally there were none of them colored people?
A. No, sir; not that I know of. I looked upon them as white.

Cross-examination by the DISTRICT ATTORNEY:

10. Q. You don't know whether they were white or black?
A. I can't say; they were all supposed to be white.
11. Q. Out of the other forty-five that you had, you don't know whether they were white or black?
A. I know the houses where I went there were all white people, and I took them to be white.
12. Q. (By Mr. MAHER.) Of the whole sixty?
A. Yes, sir.

THOMAS GREGSON, a witness on the part of the mover, who, being called and sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. What is your official position?
A. Deputy sheriff.
2. Q. Did you have occasion during the month of September to serve any subpœnas for the jury commissioners?
A. A very few of them.
3. Q. About how many?
A. Four or five, I think.
4. Q. You did have some?
A. Yes, sir.
5. Q. You don't know the number?
A. Yes, sir; about four or five.
19 6. Q. Well, of those four or five summons that you had from the jury commissioners were any of them for colored men?
A. I only found two out of five.
7. Q. What were they?
A. White; and the others had removed.
8. Q. Did you inquire whether they were white or colored?
A. No, sir.
9. Q. The three that you didn't find, you don't know whether they were white or colored?
A. No, sir.
10. Q. Those you served were white?
A. Yes, sir.

GEORGE BOYA, a witness on the part of the mover, who being called was sworn by the minute clerk and testified as follows:

Examination by Mr. MAHER:

1. Q. You are a criminal deputy sheriff?
A. Yes, sir.
2. Q. In performing your duties as criminal deputy sheriff in the month of September did you make any services for the jury commissioners?
A. I did.
3. Q. How many summons did you have?
A. About 130.
4. Q. How many colored men did you serve?
A. Well, I don't know that I served any.
5. Q. Out of the 130 how many personal services did you make?
A. Between twenty-five and thirty.
6. Q. And the others were domicile services?
A. Yes, sir.
7. Q. Out of the twenty or thirty that you personally served, were there any colored men?
A. No, sir.
8. Q. The balance, the domicile service, were there any colored men among them where you located the parties living there?
A. I didn't see any.
9. Q. The family or the person that you left the service with indicated that they were white people?
A. In the case of colored services, I can't say.
10. Q. Is it not within your knowledge that the parties keeping the houses were white people?
A. Yes, sir.
11. Q. Out of 130 were all of them white?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

12. Q. You don't know whether the subpœnas that you did not serve personally were for white and black *of* for both?
A. No, sir.
13. Q. Were you in attendance in this court during the month of October?
A. Yes, sir.
14. Q. Were you here during the impanellment of the present grand jury?
A. Yes, sir.
15. Q. Do you remember whether there were any colored men on that panel?
A. If I remember right, there were some.
16. Q. Were there not one light man and two very black men?
A. Yes, sir.
17. Q. Was there not one very light man allot'ed to Section B and excused by Judge Moise?
A. Yes, sir.
18. Q. And one that served in Section A during the whole month?

21 A. Yes, sir.

19. Q. And there was one allotted to Section B, a very black man?

A. I don't remember.

20. Q. You do remember one colored man, a very black man, serving in Section A during the month of October, which was the panel from which the present grand jury was drawn and formed?

A. Yes, sir.

Capt. E. R. CHEVALLEY, a witness called by the mover, who, being duly sworn by the minute clerk, did testify, as follows:

Examination by Mr. MAHER:

1. Q. What official position do you hold?

A. Jury commissioner.

2. Q. Of the parish of Orleans?

A. Yes, sir.

3. Q. As one of the jury commissioners of the parish of Orleans, did you assist in making up the present grand jury of this parish?

A. No, sir; the court did that.

4. Q. Did you examine, as jury commissioner, the parties that were brought before you from which the 1,000 names that you placed in the jury wheel as jury commissioner, from which the present grand and petit juries were drawn?

A. We examined them. A majority of the board always do that—two out of three.

5. Q. How many subpœnas or summons did you issue to make up that 1,000 names that you placed in the jury wheel as jury commissioner during the month of September last?

A. About 3,500 names.

6. Q. Where did you get those 3,500 names?

A. Some from the registration office and some from the directory.

22 7. Q. How many did you get from the registration office?

A. I didn't count them.

8. Q. Therefore you don't know how many you got from other sources outside of the registration office?

A. We don't keep a count. We just take such names as we think will make good jurors and we qualify them.

9. Q. Whether they are legal jurors or not, it makes no difference.

A. They must be legal and good jurors or they can not qualify.

10. Q. You have the list of the 1,000 names?

A. Yes, sir.

11. Q. In the list of 1,000 names, is it within your knowledge how many colored men are upon that list?

A. No, sir.

12. Q. Out of that 3,500 that you stated you qualified to put in that wheel for the month of September, how many colored men appeared before you for qualification?

A. I can't say; a good many.

13. Q. You keep the list of the names?

A. We keep the list after they qualify.

14. Q. You don't know how many colored men are in the wheel at the present time?

A. Some might look very white and be colored, and some may be dark and might be white. It is difficult to keep a correct list of what goes into the wheel as to white or colored.

By the DISTRICT ATTORNEY:

15. Q. As a matter of fact, colored men have been summoned to appear before the jury commissioners to qualify as jurors?

A. Yes, sir.

16. Q. As a matter of fact, there are names of persons who you know to be colored men in the wheel at present?

A. Yes, sir.

23 17. Q. As a matter of fact, colored men have appeared and qualified as jurors and have been drawn to appear on the 1st of October last, in the panel from which the present grand jury was drawn?

A. Yes, sir; there were two colored men on the panel from which the present grand jury was drawn.

18. Q. Capt. Chevalley, did the board of jury commissioners, at any time in the issuance of papers for appearance before the board of jury commissioners, discriminate against the colored man?

A. No, sir; never.

19. Q. In selecting your names from the registration list and partly from the city directory, I understood you to say that you selected them as regarded what you knew their qualifications to be, without regard to their color?

A. Yes, sir; we take the names from the registration indiscriminately. We have to use some discretion, or we would not get a jury in a year?

20. Q. In using that discretion, it was for the purpose of getting intelligent and competent jurors without regard to race, color, or previous condition?

A. Exactly, sir.

21. Q. In summoning parties before your board, was there any discrimination against colored men?

A. No, sir.

22. Q. A great many colored men were summoned?

A. Yes, sir.

23. Q. And there were two colored men drawn?

A. Yes, sir; on the last panel.

24. Q. From which the present grand jury was formed?

A. Yes, sir.

24 By Mr. MAHER:

25. Q. Drawn out of the 1,000 names?

A. Yes, sir.

26. Q. How did you come to the conclusion in answering the district attorney that you knew there were a great many colored men in the wheel?

A. Well, I think I know a colored man when I see him.

27. Q. And you don't know how many?

A. No, sir; I have answered that question, but those two I am pretty sure of. I am sure they are colored men.

28. Q. How did you make that discovery?

A. Because I knew it.

29. Q. As I understood you, you stated that out of the 3,500 names that you obtained from the registration books as well as from the city directory of this parish—did I understand you to say that out of that number there were 35 or 40 colored men who appeared before you for qualification?

A. I didn't say anything of the kind. I can't say how many.

30. Q. I ask you about?

A. I stated a good number. I didn't keep an account. A good many.

31. Q. By the COURT. I understood you to say a good many.

A. Yes, sir; that was my statement.

Captain E. O. MALANCON, a witness called on the part of the mover, who, being duly sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. You are one of the jury commissioners of this parish?

A. Yes, sir.

2. Q. Did you assist in qualifying the 1,000 names put in the jury wheel from which the grand and petit juries were selected for the month of October?

A. Yes, sir.

3. Q. Did you personally qualify any of the persons that appeared in response to your summons?

A. We always qualify them as a board.

4. Q. How many summons were issued.

A. Twenty-three hundred and some odd, during the five days of September, to complete the jury wheel, and there were 1,062 in the wheel.

5. Q. I understood you to say 2,300?

A. A little over 2,300.

6. Q. Was it twenty-four hundred?

A. It was 2,330 or 2,340.

7. Q. You were present and assissted in qualifying all these parties?

A. Yes, sir.

8. Q. How many colored men appeared before you?

A. I can't say exactly the number, but there were several.

9. Q. Can't you try and approximate the number?

A. I can't.

10. Q. You can't, about?

A. No, sir.

11. Q. Were there three?

A. I can't say exactly the number. There were colored people who appeared before us and qualified. There are a great many people with colored blood and we don't know it, and there are a great many others who you can tell by looking at them.

12. Q. Where did you get these names from, that you sent out by the deputy sheriffs for qualification?

A. From the registration and the directory; principally from the registration.

26 Cross-examination by the DISTRICT ATTORNEY:

13. Q. When you say there were twenty-three hundred and some odd names summons, issued in filling the wheel for the October term, you are speaking of the first drawing in October?

A. I mean for the first drawing made in September for the October term.

14. Q. Since that time there has been over 1,000 names, making the 3,500 issued up to date?

A. Yes, sir; what I meant was to fill the wheel in September.

15. Q. I understood you to say that these lists were made up from the registration books and partly from the city directory?

A. Yes, sir.

16. Q. In making these selections, were you influenced in any sense by the question of race or color?

A. Never, sir.

17. Q. And where you found a name that you thought the person would make a good intelligent juror, you took him?

A. Yes, sir.

18. Q. A number of colored men are in the wheel?

A. Yes, sir.

19. Q. Do you know whether or not any colored men were drawn during the October term from which this grand jury was formed?

A. Yes, sir; two colored men were drawn.

20. Q. At any time, Capt. Malacon, did you refuse to accept a juror whom you considered intelligent, because of his race, color, or previous condition?

A. Never, sir; whenever a colored man appears before us and he is qualified, we put him in the wheel.

21. Q. These names that have been drawn is, so far as color, race, or previous condition is concerned, were drawn fairly and impartially?

27 A. Yes, sir.

By Mr. MAHER:

22. Q. Just how many colored men appeared before you for qualification you don't know?

A. It is very hard to tell; some have colored blood in them and they are as white as you.

23. Q. How do they rank in the community in which they live?

A. As colored.

24. Q. And in the community in which they are not known?

A. As white men; there are some people in this city with colored blood who are whiter than I am.

25. Q. Some people appeared before you, you say, that you are not able to discern whether they are white or colored?

A. Yes; one or two of them I have been told of since.

26. Q. You can't discern between colored and white?

A. Yes, but it is as I have told you.

Mr. LOUIS ARNAULT, a witness called on the part of the mover, who, being duly sworn by the minute clerk, did testify as follows:

Examination by Mr. MAHER:

1. Q. You are one of the jury commissioners?
A. Yes, sir.
2. Q. A recent appointment?
A. Yes, sir.
3. Q. (By the DISTRICT ATTORNEY.) You were appointed and then reappointed?
A. Yes, sir.
4. Q. When you were appointed jury commissioner—when was it that you were appointed?
A. I qualified twice; the 30th of Aug. was the last time under the new act.

28 5. Q. You assisted in qualifying and examining persons who appeared before the board of jury commissioners?
A. Yes, sir.
6. Q. And in placing their names in the wheel to make up the 1,000 names under the law?
A. Yes, sir.
7. Q. How many colored men appeared before you?
A. Some.
8. Q. Can't you approximate?
A. No, sir; I can't say.
9. Q. You don't know the amount?
A. No, sir.
10. Q. You are able to discern a colored man from a white man?
A. Sometimes; yes.

Cross-examination by the DISTRICT ATTORNEY:

11. Q. In selecting a juror, in going over the registration lists or city directory, from the sound of the name that the person would be a good juror, you summoned him without consideration of race or color?
A. Yes, sir; and I must say that there are some colored men that I know that I would summon and select in preference to some white men that I know.
12. Q. There was no discrimination because of race, color, or previous condition?
A. No, sir.
13. Q. With reference to the color, it was a fair and impartial selection?
A. Yes, sir.
14. Q. You don't know how many colored men are in the wheel?
A. No, sir; there are some.

29 By the COURT:

15. Q. The names are written on slips?
A. Yes, sir.
16. Q. Is there anything on the list to indicate the color of the juror?
A. No, sir; nothing at all. It has the number, the name, and the residence of the person, and that is all.

NOTE.—Counsel for the mover calls for the list of names that are in the jury wheel—the list of 1,000 names.

Ruling of court: The court declines to permit counsel to inspect the list in the hands of the jury commissioners. It is in evidence that the list referred to is drawn pursuant to the provisions of the statute and contains no more than the numbers in the order of listing, the names of the persons selected, with their addresses, and there is nothing to indicate the color of the persons selected and qualified to serve as jurors, and that although counsel has been asked to suggest in what way an inspection of the list would affect the defendant in sustaining his challenge to the array of grand jurors, he has failed to make such suggestion.

Exception reserved. Counsel for the mover excepts to the ruling of the court on the following grounds:

That the act No. 170 of 1894, that part of section 2, reads as follows: "A list of these names shall be prepared, certified to by the commissioners, and kept as part of the records of their office, subject to the orders of the judges of the criminal district court of said parish. The names on said list shall be copied on slips prepared for the purpose, with the number and address corresponding with that on the list, and shall be placed in the jury wheel from which the drawing is to be made, &c."

That the request of the defendant was that this was a public
30 document subject to inspection by the public, and that it was asked for either to correct or contradict the testimony of the jury commissioners, as they from their testimony as adduced could not fix the definite or approximate number of colored persons brought before them for examination and qualification.

Submitted.

Reported by A. E. Oliveira, official stenographer.

31 *Return of the registrar of voters to subpœna duces tecum, offered in evidence on challenge to the array of grand jurors. Filed February 2nd, 1895.*

Criminal district court, parish of Orleans, Section A.

Now comes Francis C. Zacharie, supervisor of registration for the parish of Orleans, and for answer and return to the subpœna duces tecum issued by this honorable court to produce "the total number of white citizens registered as voters in the parish of Orleans who can read and write, the total number of colored citizens registered as voters in the parish of Orleans who can read and write," produces and files herewith an accurate report of the number of registered voters in the parish of Orleans, the number of native and foreign born, and the number of colored voters, respectively, who write their names, and the number who make their mark, compiled by respondent and his clerk in 1892, November or December, and filed with the secretary of state of Louisiana in pursuance of section 43 of the registration act, approved April 10th, 1880, being act 123 of the session of that year; that respondent has no other tabulation or classification of the registered voters of the parish of Orleans from the registration since 1892, nor is he required to make any save after each general election, and there has been no general election since 1892, the late Congressional election having been an election by districts and not general, or by general tickets voted for throughout the whole State, in which sense respondent construes

the law; that even if the State required such a compilation, tabulation, classification, and report after Congressional elections, it is and would
32 be impossible for respondent to complete the same in less than sixty or ninety days, as there are nearly sixty thousand names to be so tabulated and classified, and respondent has at his disposal no clerical force save his chief clerk, and there is no appropriation or means whereby such clerical force could be employed and paid, unless said expenses shall be defrayed by the applicant for this subpœna duces tecum.

(Signed) FRANCIS C. ZACHARIE.

Signed and sworn to before me this 15th day of November, 1894.

[SEAL.] (Signed) F. J. LETTEN,
Minute Clerk.

Compiled statement of registered voters, parish of Orleans, after general election, 1892, made in November or December, 1892.

Native white born who sign	35,382
Native born who make x	4,571
Foreign white who sign	8,283
Foreign born who make x	1,672
Colored who sign	5,431
Colored who make x	4,223
Total	59,262

(Signed) FRANCIS C. ZACHARIE,
Supervisor of Registration, Parish of Orleans.

33 *Reasons for overruling challenge to array of grand jurors. Filed and delivered in open court, November 20th, 1894.*

STATE OF LOUISIANA
vs.
GEORGE HEARD. } No. 22325. Indictment for manslaughter.

Section A, criminal district court, Hon. J. H. Ferguson, judge.

On challenge to array of grand jurors, defendant in the above-entitled cause challenged the array of grand jurors on the following grounds:

That the jury commissioners of this parish have not complied with article 116 of the constitution of 1879 and the acts of the legislature in conformity therewith;

That the names of citizens competent to serve as jurors returned into court by the jury commissioners, from which the court elected the grand jury, is illegal, and violative of article 6 of the constitution of 1879;

That the jury commissioners of this parish violated the 13th and 15th amendments of the Constitution of the United States in excluding one class of citizens from the right of suffrage who are possessed of all the legal qualifications requisite to conform to article 116 of the constitution of 1879 and act 170 of 1894, as to competency and intelligence; and that said commissioners violated article 188 of the constitution of 1879.

Defendant prays that said challenge be maintained, and that it be decreed that the presentment of the grand jury in this case is illegal, null,
34 and void, and without effect, and that the form of law has not been complied with by the jury commissioners.

Simplified, the position of defendant that the present grand jury is not composed in part of negroes.

That persons of African descent were excluded from the general venire by said commissioners on account of their race, color, and previous condition. It was incumbent upon the defendant to establish, on the trial of said plea, the essential allegations therein contained.

The evidence adduced does not sustain the plea.

The jury commissioners were called as witnesses for the defendant. They testified that they had acted fairly and impartially in the discharge of their duties as commissioners and in strict conformity to the provisions of act No. 170 of 1894.

That "there were quite a number of names of colored men in the jury wheel at the time the October jury was drawn, and that there were at least two colored men on the said October panel from which the present grand jury were chosen."

That they have never discriminated on account of race, color, or previous condition. Deputy sheriffs were placed upon the stand by defendant's attorney. These witnesses testified that they could not state positively that any of the persons served personally with jury notices were colored; that many notices were left at the domicile of the jurors, and that they could not state whether they were white or colored.

35 The Supreme Court in the case entitled State vs. Joseph (45 A., p. 905), held that while it is undeniable that the exclusion from the general venire of all people of the African race on account of their color or race would be an abridgment of the privileges and rights of such citizens within the meaning and intendment of the fourteenth amendment of the Federal Constitution, and would operate a denial to persons of that race who might be indicted of the equal protection of the law within meaning of Shander vs. West Virginia (100 U. S., 303), yet, in our conception, the evidence does not disclose such a case. For it appears that there are in the general venire box three hundred names, from which are drawn the names which compose the general venire from which the grand and petit juries are drawn; that at an ensuing term of court only a sufficient number of names is added by the jury commissioners to keep the general venire at that standard; that following this rule the jury commissioners on this occasion put into the box eighty additional names, and from the three hundred names therein the grand and petit juries were drawn.

It is quite true that all the names that were drawn from the box were those of white people, though it is not established by any testimony in the record that all of the three hundred names in the general box were those of white people.

This is destructive of defendant's theory, because he had the chance of some colored persons being drawn from the box, unless it was exclusively made up of the names of white persons—and in addition to this argument is the fact sworn to by one of the jury commissioners "that people of African descent were not excluded from the venire box on account of their race or color."

35½ In the instant case, it was established as aforesaid, that the general venire box or wheel is not exclusively made up of the names of white persons, and it also was clearly established that colored people were not excluded from the venire wheel on account of their race or color.

The challenge to the array is overruled.

36 *Bill of exceptions and assignment of errors. Filed November 30th, 1894.*

STATE OF LOUISIANA
vs.
GEORGE HEARD. } No. 22325. Indictment for manslaughter.

Criminal district court, Section A, Hon J. H. Ferguson, judge.

The defense respectfully submits that the court erred in overruling the challenge to the grand jury for the following reasons:

The jury commissioners, being charged with a violation of their duties and depriving citizens of their constitutional rights and privileges, could not be viewed otherwise than as unwilling and reluctant witnesses, and could not be expected to criminate themselves and be subject to arrest and a fine of five thousand dollars by the Federal authorities under a statute of the United States if they had testified positively that they were guilty of violating or evading directly or indirectly the 14th amendment to the Constitution of the United States on account of race, color, or previous condition of servitude in the issuing of summons for citizens to appear before them to be qualified and put in the jury wheel of this parish. Chevalley, jury commissioner, testimony is, that in the month of September, 1894, 3,500 citizens which he and the other commissioners got their names from the city directory and the books of registration of this parish appeared before them for qualification, out of which 3,500 names 1,000 men qualified and were placed in the jury wheel, out of which was drawn the venire, and out of said venire
37 the court selected said grand jurors which indicted the accused.

Chevalley testified that it was not within his knowledge how many colored men were on the list (the names of the 1,000 qualified citizens in the jury wheel). Chevalley could not state positively how many colored men were summoned to appear before them out of the 3,500 for the month of September, 1894. In answer to a question if he knew how many colored men were in the wheel at the present time, he answered, "Some might look very white and be colored, and some may be dark and be white." It is difficult to keep a correct list of what goes into the wheel as to white and colored. Yet he states a good many colored men appeared before him for qualification, and managed to testify of two colored men whose names were placed in the wheel. Two out of 1,000 is not a fair proportion of the admission of the district attorney that $15\frac{2}{3}$ per cent of the colored voters registered in the parish of Orleans; $12\frac{1}{2}$ per cent of that amount of the total colored vote can sign their names. This admission is taken from the returns of the registrar of voters after the general election of 1892, which is not a response to the subpœna duces tecum ordered by the court on the motion of counsel for defendant. Even accepting this admission as a guide, there is a presumption, coupled with the vacillating and uncertain testimony of the jury commissioners, that there has been a discrimination. Malacon said a little more than 2,300 persons appeared for qualification; could not say how many colored men; and when asked if there were three, said that he could not exactly tell the number. There were colored people who appeared before us and qualified. There are a great many people with colored blood and we

don't know it, and there are a great many others who you can tell
38 by looking at them. That answer can not be construed otherwise than stupid or evasive, or the witness does not know what discrimination means. In cross-examination he stated two colored men were drawn, and there are a good many colored men in the jury wheel. Arnault don't know how many colored men appeared before him to be qualified. He says some, and he is able to discern a colored man from a white man sometimes. King, deputy sheriff, served summons for jury commissioners in the month of September of this year; made personal service, none on colored people; for domicile service, don't know who lived in the houses. Made no personal service on colored men. Remembers that he had an attachment for a colored man; don't state whether it was a witness or when he had the attachment (may have been since his attachment to the criminal court in 1892).

McFarland, deputy sheriff, had 15 or 20 jury notices issued from the clerk's office. None were issued to colored people that he knew. He served no colored man personally. He did not know the people who lived in the houses where he made domicile services. He was in and out of the court room and saw the grand and petit juries made up for October; didn't pay much attention whether there were any colored men among them.

McNeil, deputy sheriff, served notices for jury commissioners; don't know how many; can't say those who he served were colored or not.

Lemm, deputy sheriff, served jury summons for September, 1894; don't know how many. No colored people among them that he knew of. Did not serve any colored men that he knew of with notices to appear before the jury commissioners.

39 Boisidore, deputy sheriff, served between 60 and 75 summons to citizens to appear before jury commissioners. Didn't serve any niggers. Among white persons there are some colored people, but I don't know whether they are white or not. Served 15 personally out of 60. None of the personal services were colored men; I looked upon them as white men. The other 45 that I had, I know the houses where they live; I know them all to be white people, and I took them to be white.

Gregson, deputy sheriff, had from four to five subpœnas for jury commissioners; found only two out of the five; they were white; the others had removed. Didn't inquire whether the others were white or colored.

Boya, deputy sheriff, had about 130 notices to serve for jury commissioners in the month of September, 1894. Don't know if he served any colored men. Made about 25 or 30 personal services. None of the personal services were colored men. The balance, domicile services, were all white people.

The evidence of the deputy sheriffs, as incorporated in this bill of exceptions, establishes beyond a doubt that there was a discrimination on the part of the jury commissioners in not summoning and qualifying citizens of color, who are possessed of all other legal qualifications under the constitution of this State and the United States, for jury service. If the proof of the allegations in the challenge to the grand jurors was only of a presumptive character it was in the power of and should be

rebutted by the State, with the names of the colored men who were qualified and placed in the wheel, and those who were drawn out of the wheel on the venire ought to appear in court as witnesses.

40 Chevalley, jury commissioner, says "that he don't know how many citizens he got from other sources. We just take such names as we think will make good jurors and we qualify them" (p. 12, testimony on challenge). His testimony positively established a discrimination and impartiality. When the law itself (act No. 170 of 1894) imperatively commands "that the jury commissioners shall select at large, impartially, from the citizens of the parish of Orleans, having the qualification to register as voters, etc. The court erred in overruling the challenge to grand jurors on the ground that there was no evidence in the record to show that the grand jury is not composed of colored men. The grand jury is, under act No. 170 of 1894, selected by the court from the venire; hence the chosen officers of the court and part of its organized machinery, under its eyes and instruction, and by the rules of evidence, things judicially taken notice of, without proof. The grand jurors are officers of the court chosen by the court and under the law; the court has knowledge of their competency, moral status, race, and color, without the necessity of any proof.

The court erred in not forcing the registrar of voters of this parish, a State officer, to furnish the defendants the proof in the possession of the registrar of voters at the time of the service of the subpœna duces tecum on him, public documents in his office and under his control, which defendant suggested were material as evidence in his defense, on the trial of the challenge to the grand jurors, and more particularly over the seasonable objection of defendant to the return of the registrar of voters, after the

41 admission that he was a public officer and that the evidence called for by the defendant was a public record and contained in his office, on the grounds that the late Congressional election having been an election by districts and not general, and by general ticket voted for throughout the whole State, in which sense respondent construes the law, that even if the statute required such a compilation, tabulation, classification, and report after the Congressional elections, it is and would be impossible for respondent to complete the same in less than sixty or ninety days, and there are nearly sixty thousand names to be tabulated and classified, and respondent has at his disposal no clerical force save his chief clerk, and there is no appropriation and means whereby such clerical force could be employed and paid, unless said expense shall be defrayed by the applicant for this subpœna duces tecum. Act No. 123 of 1880, creating the office of registrar of voters of the parish of Orleans, section 4, provides that the books of registration in the parish of Orleans shall consist of and be known by the following names: One precinct register from each precinct, one index or poll book from each precinct, one duplicate stub book for each ward, one general index for each ward.

Section 5. That the precinct register shall show and contain the date of registration, number of certificate of registration, name of voter, residence, age, color, occupation, when born, name of house holder, time of residence in the State, parish, and ward, oath of registration, remarks. The applicant for registration shall sign the oath of registration, and in case the applicant can not write, he shall make his mark.

42 Section 43. That it shall be the duty of the supervisor of registration and the assessor of each parish within five days after the close of the election, to forward to the secretary of state an accurate report of the number of registered voters in their respective parishes, the number of native and foreign born, and the number of white and colored voters, respectively, who can write their names, and the number who can make their marks. And it shall be the duty of the secretary of state to furnish the legislature a tabulated statement of said reports within twenty days after the meeting thereof, after each general election. Under section 43 of act No. 123 of 1880, from the answer of the registrar of voters of this parish to the subpœna duces tecum, he has not complied with the law creating his office, and was derelict in his duty as such official at the time of the service of the subpœna duces tecum, construing the duty of the secretary of state as his privilege and misleading the court as to this section of the law under which his office is operated. His other reason why he does not comply with the order of court, i. e., that he has no clerical force and that no appropriation has been made, is perfectly preposterous and so shallow that it will not stand criticism. Zacharie's last reason why he does not comply with the order of court, and which he is supported in by the court in forcing defendant to accept his bobtail compilation made up in 1892, which defendant objected to as not a return to the subpœna duces tecum, is an attempt to deprive the defendant of his rights in a criminal prosecution, of his constitutional rights under the constitution of this State, and the 14th amendment to the Constitution of the United States, to wit, "to have
43 compulsory process for obtaining witnesses in his favor," and the defendant excepted to the ruling of the court on the following grounds, to wit: That Zacharie, register of voters, is a public officer, and that the documents material as evidence for the defense are public documents in his possession and under his control as records of his office, and that the defense is entitled under the law, the constitution of this State, and the 14th amendment to the Constitution of the United States to a copy of the evidence which he asked for and which was ordered by the court, and should have been prepared by him under section 43 of act No. 123 of 1880.

The court erred for the same reasons in not ordering the jury commissioners of this parish to furnish at the request of defendant the names and residences of the 1,000 persons they qualified and placed in the jury wheel, and which under act No. 170 of 1894, a list of which is provided, should be kept in their office. With this material proof the defendant could have established positively all his allegations set forth in his challenge to the grand jury which indicted him, and contradicted the testimony of the jury commissioners, who were charged with a violation of law, and who under the circumstances could not be otherwise than unwilling and hostile witnesses to the accused.

Defendant presents this his bill of exceptions and assignment of errors, and prays the court to sign the same.

(Signed) J. H. FERGUSON, *Judge.*

44 *Bill of exceptions and assignment of errors. Filed Nov. 30th, 1894.*

STATE OF LOUISIANA
vs.
GEORGE HEARD. } No. 22325.

Section A, criminal district court, parish of Orleans.

The defendant respectfully submits that the court erred in overruling the motion to quash the indictment in the above entitled and numbered cause, in not decreeing that act 170 of 1894, as a local or special law requiring the notice provided by article 48 of the constitution, as a prerequisite to its introduction and passage by the legislature in order to give the act life and constitutionality.

The defense contends that this act, No. 170 of 1894, as an amendment to act No. 98 of 1880, cremated act 98 of 1880, and scattered its remains by implication into the tombs of the legislation of this State. Although no repealing clause had been added, the legislature has stamped act 170 of 1894 as a special or local law, in announcing to the people of the State, "Whereas due proof has been made that the notice of intention to apply for the passage of this act had been published in accordance with the provisions of article 48 of the State constitution."

The presumption of law is that a public official had done what the law requires, until the contrary is proven. The admission of the State that no publication of the intention to apply for the passage of this act No. 170 of 1894, as amendatory to act No. 98 of 1880, was published in the French language in the New Orleans Bee or L'Abeille, a French daily newspaper published in this city and parish during the month of
45 April, 1894, thirty days before the opening of the session of the legislature for the year 1894, and during the session and up to the close of the session of 1894, and a newspaper of good standing published in this city and parish for about twenty-seven years, as the testimony of Paul Capdaville, the present proprietor and business manager, established, and there was no attempt on the part of the State to question the veracity of this witness.

The court erred in ruling that this is not a special or local law requiring publication. The lawmaking power has voiced authoritatively that it is. The judiciary has not the power on the issue presented by defendant, as to its constitutionality, to regard it in any other shape than a local or special law. In other words, the State is estopped and can not question the acts of its own lawmakers. That right alone belongs to the defendant or any other person who is deprived of life, liberty, or property without due process of law, or when forms of law have not been complied with, as in this case, or there would be a woeful clash between the two principal departments of the State government, the legislative and the judicial, sufficient to convert law and order into chaos and pandemonium, and cause peace, prosperity, and happiness to depart and repose in the visions of the past.

Act No. 38 of 1880 requires that judicial process, or in any other legal proceedings of whatever kind, shall be published in the French language, etc. An act of the legislature, as is act 170 of the acts of 1894,

is of the highest character of the legal proceedings. It is not necessary at this intelligent state of civilization and learning to apply to the lexicographers for the definition of the word "legal." In plain
46 English it is law, and act 38 of 1880, when it commands that legal proceedings shall be published in the French language, was only carrying out article 154 of the constitution when it provided that the general assembly may make provisions for the publications of the laws in the French language. As act No. 170 of 1894 is classed by the legislature as a special or local law, it is absolutely necessary to give it a constitutional body, that it should be published in the French language in order to comply with article 48 of the constitution. The provisions of the constitution were not complied with, nor was act No. 38 of 1880, and consequently act No. 170 of 1894 is null and void.

The court erred in accepting as authority State vs. Dalon (35 A., p. 1141), as applicable to this case; the issue in the Dalon Case and the contention in this case are diametrically opposed.

The Supreme Court held in the Dalon Case that act 98 of 1880 was designed to organize the criminal district court as established by article 130 of the constitution, and put the court in motion, etc. The Supreme Court in the Dalon decision defines the word "local," as applied to a bill, to an act, to a law, means such bill, act, or law as touches but a portion of the territory of the State, a part of its people, a portion of its citizens. An act is local within the meaning of the constitution which in its subjects relates to but a portion of the people of the State, or to their property, and may not either in its subjects, operations, or immediate and necessary results affect the people of the State of their property. People vs. Supervisors (43 N. Y., 7, 16). See also 10 Wis. R., p. 178;
47 4 Blatchf., 236; 9 Wis., 279; 70 Ills., 398. The Supreme Court, in speaking of articles 46 and 48 of the constitution, says: "The constitution now in force contains two articles on the subject of local or special laws; article 46, which prohibits peremptorily such legislation on the subject specified, and article 48, which forbids the same on subjects not enumerated in article 46, unless after the publication of an intention to apply for the passage thereof; the last article being therefore permissive of such legislation when the intention was published, and that fact is shown in the manner directed. A moment's reflection satisfies the mind that the intention to apply alluded to can only mean that of private individuals seeking some private advantage or advancement for the benefit of private persons or property within a certain locality.

The Supreme Court then very properly decided that act No. 98 of 1880 was essential for the discipline of a judicial organization created by the constitution, and for the administration of criminal justice in the most important subdivision of the State, and does not fall under the ban of constitutional proscription. The same applies to article 38 of 1880, relative to the publication of legal proceedings to be published in French. Act 38 of 1880 was only carrying out article 154 of the constitution, and it was declared constitutional and valid in case of Davidson vs. Houston (35 A., p. 492). In the Dalon Case, the Supreme Court says: "That a law which relates solely to the machinery of a court of justice having jurisdiction over the territory of one parish only is a local or special law,

because it does not operate throughout the State and all the
48 parishes thereof," is perfectly preposterous, and so hollow that it
can not stand criticism. Act 98 of 1880 put into working order the criminal district court with all the paraphernalia necessary in carrying into effect article 130 of the constitution.

This act done what the constitution ordered to be done, and was an enabling act. What was the purpose of act 170 of 1894? The court was in complete running order. Act 170 of 1894 is designated by the legislature as a special or local law, and as an amendment to act 98 of 1880. The title of the two acts are the same, except that act 170 of 1894 begins with the words "To amend and re-enact section 2 of act 98 of 1880, entitled 'An act.'" Section of act 170 of 1894 reads: "Be it further enacted, etc. That immediately after the passage of this act the governor," etc. Section 2 of the act No. 98 of 1880 reads: "Be it further enacted, etc., That immediately after the organization of the criminal district court for the parish of Orleans, the governor," etc. Act No. 98 of 1880 presupposed the existence of the criminal district court. Act No. 170 of 1894 has omitted the existence of the criminal district court. In the two acts the governor has the power to appoint from the registered voters three persons, to be removed at his pleasure, who shall constitute a board of jury commissioners. Act No. 170 of 1894 provides that two of whom shall be a quorum. Act No. 98 of 1880 does not provide how many of the jury commissioners is required to make a quorum. After the word "each" the two acts read the same, except the words "six hundred," in act No. 98 of 1880, is increased in the act No. 170 of 1894 to "fifteen hundred," and the word "quarterly," in act 98 of 1880, is replaced by the
word "monthly" in act 170 of 1894. In the selection and quali-
49 fying the requisite number of voters to be put in the jury wheel,
the number 1,000 in act No. 98 of 1880 is the same as act No. 170 of 1894. Act 98 of 1880 provides that the list of the names of citizens qualified by the jury commissioners and placed in the jury wheel should be made out and returned, certified under their hands, to the clerk of the criminal district court for the parish of Orleans. (This was a wise provision of the law. This list was a public document on file in the clerk's office and subject to the inspection of the public. There could be no packing of the jury wheel, and the people could see the names and residences of the citizens who were to be the judges of the law and the facts under the constitution.) Act No. 170 of 1894 provides that a list of 1,000 names shall be prepared, certified to by the commissioners, and kept as a part of the records of their office, subject to the orders of the judges of the criminal district court of said parish. The names on said lists shall be copied on slips and shall be placed in the jury wheel from which the drawings are made. (If this is the improvement and amendment, it is an infamous one. It is a kind of a bucket shop, or a fake judicial lottery, with the jury commissioners given the power to put in the wheel any names they choose as prizes for the venire.) The other amendments are so slight and are hardly worthy of any notice, except that of act No. 170 of 1894 provides that 12 days before the expiration of the monthly session of the criminal district court the judicial lottery shall take place with the prizes as prepared by the jury commissioners, and making provisions for all objections to the manner of drawing jurors, etc., that can be placed

against any array of venire must be urged within the three judicial
50 days of the term. This hybrid act (170 of 1894) ends its title as follows, "and repeals all laws and parts of laws in conflict herewith." Yet it has no repealing clause.

The court erred in not decreeing act No. 170 of 1894 as a local or special law, coming under the provisions of article 48 of the constitution, and the decision of the Supreme Court in the Dalon Case (35 A., p. 1141). The Supreme Court says in that case: "The real distinction between public or general laws and local or special laws is, that the former affects the community as a whole; and the latter affects private persons, private property, private or local private interests."

What has been the intention of the lawmaker in creating act 170 of 1894? Not to organize the criminal district court, or put its machinery in motion, but to increase the salary of the jury commissioners, and to confer upon them a power in preparing the jurors for the criminal district court (not possessed by the Cæsars) over the life and liberty of the people of this parish. The increased salary affects the purse of the jury commissioners. It is a private interest and increased the power of the jury commissioners, and locks up their secrets as to how and who they qualify as citizens for jury service from the people, with as much mystery as the existence of the unknown sea beyond the North Pole, said to be the space between the earth and the planet Mars.

Act No. 98 of 1880 was amended for this and no other reasons, and, being guided by the wording of the Supreme Court in the Dalon Case, the contention that act No. 170 of 1894 is a special or local law is not perfectly preposterous, and is not so hollow but that it will stand criticism.

51 The court erred in not decreeing act No. 170 of 1894 unconstitutional for omitting the compliance clause to the 14th amendment of the Constitution of the United States.

All jury laws in this State have this clause, except the parish of Orleans, since the reconstruction and ratification of the amendments to the Constitution of the United States, and in conformity with act 110 of the acts of 1868.

The defendant presents this his bill of exceptions and assignment of errors, and prays the court to sign the same.

(Signed) J. H. FERGUSON, *Judge.*

Order to produce proof, filing affidavit and bills of exceptions, Nos. 1 and 2.

[Extract from the minutes, Tuesday, February 5th, 1895.]

STATE OF LOUISIANA } No. 22494. Indictment for
vs. } murder.
JIM MURRAY, ALIAS GREESY JIM. }

Section B, criminal district court for the parish of Orleans, Hon. James C. Moise, judge.

The defendant, Jim Murray, alias Greasy Jim, in person being placed at the bar of the court, in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq., argument on the challenge to the array of

grand jurors herein pending was then resumed; after which the court ruled that the counsel must produce proof without resorting to produce the same through the court, to which ruling of the court counsel for defendant excepted, and, with consent of the court, reserved his right to file a bill of exception. Counsel for defendant this day presented to the court bills of exceptions Nos. 1 and 2, which were ordered filed,
52 also an affidavit sworn and subscribed to by the defendant, which was ordered filed. The court then took the matters herein pending under advisement, and ordered the accused remanded to await further proceedings.

Affidavit. Filed February 5th, 1895.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

Section B, criminal district court.

James Murray, the accused in the above entitled and numbered cause, doth depose and say that the allegations set forth in the challenge to the grand jury which indicted him, to the best of his knowledge and belief, are true and correct, and that motion for subpœna duces tecum on Francis C. Zacharie for the evidence therein requested is necessary and material in his defense to support the allegations contained in the challenge to the grand jury; and that the motion for a subpœna duces tecum on the jury commissioners for the evidence therein requested is necessary and material in his defense to support the allegations contained in the challenge to the grand jury.

(Signed) JIM MURRAY.

Sworn and subscribed before me this 5th day of February, 1895.

(Signed) A. J. DESMOND, *Minute Clerk.*

53 *Bill of exceptions and assignment of errors, No. 1. Filed February 5th, 1894.*

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court in and for the parish of Orleans, Section B, Hon. James C. Moise, judge.

Be it remembered that on the 10th day of January, 1895, counsel for accused presented to Judge James C. Moise, of this honorable court, during the session, a challenge to the grand jury which indicted him, and in support of said challenge a motion for a subpœna duces tecum on Francis C. Zacharie, a State official, whose office has been created by act No. 123 of the acts of 1880.

Counsel for accused alleged in said motion that the evidence sought to be had in support of said challenge was necessary and material to his

defense. Whereupon the court ordered the challenge which indicted the accused, as well as a motion for a subpœna duces tecum on Francis C. Zacharie, registrar of voters, to be filed, with the following extract on the minutes: "Subject to argument on face of papers."

Be it further remembered that on the second day of February, 1895, the day fixed for argument, counsel for the accused was present in court, and the challenge to the grand jury was read, and insisted that the evidence sought to be had from Francis C. Zacharie, registrar of voters (a State official), in whose possession and under whose control the said evidence was necessary and material to support the allegations in the challenge to the grand jury. The court refused to order the issu-
54 ance of the subpœna duces tecum on Francis C. Zacharie, registrar of voters. Whereupon counsel for the accused reserved his bill of exceptions to the ruling of the court, and assigns the following reasons as error to the prejudice of the accused: That the entry on the minutes of this honorable court, subject to argument on face of papers, is a judicial act, novel, without precedent in exceptor's opinion, and violative of article 6 of the constitution of this State, as well as the 14th amendment to the Constitution of the United States.

That the order for the issuance of a subpœna duces tecum is a judicial act, and the refusal of the court to issue a subpœna duces tecum on Francis C. Zacharie, registrar of voters, a public official of this State, to furnish the accused with an extract from the public records of his office, which he has alleged in his challenge to the grand jury, was necessary and material in his defense in this case, the ruling of the court is prejudicial to the legal rights of the accused and prevents him from establishing his defense by lawful evidence, and violates article 8 of the constitution of this State and the 14th amendment to the Constitution of the United States.

Exceptor prays the court to sign these his assignment of errors and bill of exceptions.

Per curiam: The so-called writ of subpœna duces tecum is made part of this bill. It does not describe or refer to any paper or document which the defendant required. The books or documents required by defendant should have been specified, or the information sought could have been obtained from the registrar of voters by a writ of subpœna ad testificandum. I know of no law which would warrant a court
55 to order an official to do the work necessary to give the number of voters, white and black, etc., under a subpœna duces tecum as applied for in this case.

(Signed) JAMES C. MOISE, *Judge.*

Assignment of errors and bill of exception, No. 2. Filed February 5th, 1895.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court, in and for the parish of Orleans, Section B.

Be it remembered that on the issue suggested by the court subject to argument on face of papers, after the filing by the accused of a challenge

to the grand jury which indicted him, and a motion for a subpœna duces tecum on the jury commissioners of this parish, public officers created by act No. 170 of the acts of 1894, requesting that the said jury commissioners furnish, as necessary and material to the defense as evidence, the names and residences of the 3,500 citizens who they summoned before them in the month of September, 1894, as sworn to by them in the testimony taken in the case of State vs. George Heard, No. 22325 of the docket of this court, and offered in evidence in this issue by the district attorney, who represents the State, and the names and residences of the 1,000 citizens whom they qualified for jury service as grand and petit jurors, and which they placed in the jury wheel, out of which the venire was drawn, and returned into court, and out of which the judge of Section A of this court selected the grand jury which indicted the accused, as sworn to by them in the testimony taken in the case of State vs. George Heard,

56 No. 22325 of the docket of this court, in the challenge to the grand jury and offered in evidence in this issue by the district attorney, who represents the State. The court refused to issue the order granting the subpœna duces tecum.

Wherefore counsel for the accused excepted to the ruling of the court on the following grounds, to wit:

That the refusal of the issuance of the subpœna duces teum is a judicial act, and violative of article 8 of the State constitution and the 14th amendment of the Constitution of the United States, and thereby prejudiced the legal rights of the accused.

Exceptor prays that the court sign these assignment of errors and bill of exceptions.

Per curiam: The subpœna referred to is made part of this bill. As stated in the first bill, no paper, document, of book has been described or referred to herein. This writ does not issue for the purpose of compelling officers to give information, but to secure the production of books or papers in court. Besides, the evidence needed by defendant could be secured by writ of subpœna ad testificandum.

(Signed) JAMES C. MOISE, *Judge*.

57 *Challenge to the array of grand jurors overruled.*

[Extract from the minutes, February 5th, 1895.]

STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

Section B, criminal district court, Hon. James C. Moise, judge.

The court, for reasons orally assigned, and the evidence and the law being in favor of the State, overruled the challenge to the array of grand jurors herein pending.

Motion to quash indictment. Filed February 8th, 1895.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court in and for the parish of Orleans, Section B.

On motion of Thomas F. Maher, counsel for accused, and upon suggesting to the court that act No. 170 of the acts of 1894, under the provisions of which the grand jury which indicted the accused was organized and impanelled is unconstitutional, null, and void, in this, to wit: That the legislature which passed act No. 170 of 1894, being a special or local law, does not conform with articles 48 and 154 of the constitution of this State and the act of the legislature in conformity therewith, as well as the jurisprudence of the Supreme Court on this subject-matter.

That act No. 170 of 1894, as passed by the legislature, does not contain the compliance clause of the 13th, 14th, and 15th amend-
58 ments to the Federal Constitution, provided for by all other jury laws in this State, providing that there shall be no discrimination on account of race, color, or previous condition of servitude.

Mover prays that this honorable court pass upon the constitutionality of act No. 170 of 1894, under the provisions of which the grand jury which indicted the accused was organized and impaneled, and decree said act No. 170 of 1894 unconstitutional, null, and void, and the indictment thereunder against the accused ultra vires and of no effect, and for all other relief in the premises this honorable court is competent to grant.

(Signed) THOMAS F. MAHER,
Atty. for Accused.

Argument on motion to quash indictment.

[Extract from the minutes of February 9th, 1895.]

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Section B, criminal district court, Hon. J. C. Moise, judge.

Argument on the motion to quash the indictment herein having been fixed for hearing this day, Thomas F. Maher, of counsel for defendant, then read to the court said motion. Whereupon the State admitted that publication was not made in French in any newspaper, and that publication was not made in the New Orleans Bee; that the New Orleans Bee was a newspaper published in New Orleans one year previous to the session of the legislature of 1894. Counsel for defendant then addressed the court in argument and was replied to by the State; whereupon the court took the matter under advisement.

59 *Motion to quash overruled.*

[Extract from minutes, Monday, February 11th, 1895.]

THE STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

Section B, criminal district court, Hon. J. C. Moise, judge.

The court, for reasons orally assigned and the evidence and the law being in favor of the State, overruled the challenge to the array of grand jurors herein pending, and ordered that as said judgment was rendered on Thursday, February 7th, 1895, the same be recorded nunc pro tunc. And for reasons orally assigned the court this day overruled the motion to quash herein pending.

Order for removal of cause filed and overruled. Bill of exceptions reserved. Arraignment of accused.

[Extract from minutes, February 19th, 1895.]

THE STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Section B, criminal district court, Hon. J. C. Moise, judge.

The defendant, Jim Murray, alias Greasy Jim, in person being placed at the bar of the court in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq. Thereupon said counsel presented to the court an application for removal of cause herein, and having read the same to the court, the court ordered said application filed and overruled the same for reasons orally assigned, to which ruling of the court counsel excepted, and with consent of the court reserved the right to file a bill of exceptions.

60 Thereupon the defendant was arraigned upon the charge preferred against him in the above indictment, and having heard the indictment read, together with the finding of the grand jury therein, and endorsements thereon, he pleaded not guilty thereto. The court ordered the plea recorded and the accused remanded to await further proceedings.

Application for removal of cause to U. S. circuit court. Filed and overruled by the court February 19, 1895.

To the Honorable James C. Moise, judge of Section B of the criminal district court for the parish of Orleans:

The petition of James Murray, to whose name the officers of the State have added the alias of Greasy Jim, a native-born American citizen, of the African race and color, with respect represents that your petitioner is now in the custody of the authorities of the parish of Orleans under an indictment of the grand jury for the crime of murder.

Petitioner avers that the said indictment was presented to this court by the grand jury, which was qualified by the jury commissioners of this parish during the month of September, 1894, selected, sworn, and impanelled by the judge of Section A of this court under the provisions of act No. 170 of the acts of 1894.

Petitioner further avers that the jury commissioners of this parish, to whom under act No. 170 of 1894 the power is given to qualify citizens for jury service, violated the 14th amendment to the Constitution of the United States by failing to summon before them for qualification citizens of the race and color of petitioner, in compliance with the articles of the constitution of this State and the jury laws in conformity therewith.

61 Petitioner further avers that the jury commissioners, by their said illegal action and conduct, have excluded from jury service citizens of the race and color of petitioner, although they are possessed of all other legal qualifications requisite under the constitution of this State and the laws thereof, as well as the Constitution of the United States, to serve as grand jurors.

Petitioner avers that act No. 170 of the acts of 1894, creating, qualifying, and organizing the grand jury which indicted him, is unconstitutional in this, that the said act has omitted the compliance clause of the 14th amendment of the Federal Constitution, provided for in all other jury laws of this State since the adoption and ratification of the amendments.

Petitioner avers that said jury commissioners did illegally confine their summons and qualification for jury service to white citizens only, and that there is no criminal statute of this State to coerce or punish them for this illegal discrimination on account of race, color, etc.

Petitioner further avers that the right secured to him by the constitution of this State and the law providing for the equal rights of all citizens of the United States was denied him in this court as herein alleged. "That on the 10th of January, 1895, counsel for petitioner filed a challenge to the grand jury which indicted him, and it was ordered filed by the court, 'subject to argument on face of papers,'" and accompanying said challenge a motion for a subpœna duces tecum on registrar of voters and jury commissioners of this parish to furnish evidence, information in their possession as public officials, to support as proof the challenge to the grand jury. Said motions for subpœna duces tecum, which petitioner swore were necessary and material for his defense, was refused

62 by the court. Petitioner avers that the act of this court in the subpœna duces tecum was judicial act, depriving him of due process of law and compulsory process to obtain witnesses in his favor, in violation of article 6 and 8 of the constitution of this State and denying to him the equal protection of the law in violation of the 14th amendment to the Constitution of the United States.

Petitioner avers that the man who he is charged with having murdered was a white man, and that the local prejudice is of such a strong character against his obtaining a fair and impartial trial (independent of the merits of the case, and based solely upon the fact that he is a colored man and the man he is accused of murdering was a white man) in this court or any other court in this State to which the case could be removed;

by this statement of facts, newspaper publications in the Times-Democrat of December 16th, 1894, and the Daily Item of February 3rd, 1895, and other dates (two of the leading journals published in this city), with a large circulation and a powerful influence on the minds of their readers, and the articles published of such a hostile and inflam'atory character as to cause the prejudging of his case before trial.

Petitioner avers that he can not have the full and equal benefit of all the laws and proceedings in the courts of the parish of Orleans, or State of Louisiana, as enjoyed by white citizens, and that he has less chance of enforcing in this court or the courts of this State all his rights in this prosecution as a citizen of the United States, and there is a probability of a denial to him of his said rights on every trial which may take place upon this indictment in the courts of this parish and State.

63 Wherefore, the premises and the affidavit being considered, petitioner prays that this case may be removed to the honorable the circuit court of the United States for the circuit and district of Louisiana, to be proceeded in accordance with section 641 of the Revised Statutes of the United States, and according to law, and for general and equitable relief.

(Signed) THOS. F. MAHER,
Atty. for Petitioner.

James Murray, being sworn, doth depose and say that the allegations contained in the foregoing petition are true and correct.

(Signed) JIM MURRAY.

Sworn to and subscribed before me this 19th day of February, 1895.

(Signed) A. J. DESMOND, *Minute Clerk.*

64 *Notification to judge of application for removal of cause to the United States circuit court. Filed March 14th, 1895.*

FEB. 22ND, 1895.

Hon. JAMES C. MOISE,
Judge Section B, Criminal District Court.

ESTEEMED SIR: I received a notice yesterday evening that the case of my client, Jim Murray, alias Greasy Jim, has been fixed for the 28th of February, 1895. I consider myself in duty bound to notify your honor that I am about to apply to the circuit court of the United States for the circuit and district of Louisiana for a writ of prohibition, certiorari, and habeas corpus cum causa, as my interpretation of section 641 of the R. S. of the United States is that, after filing the petition for removal of cause in Section B of the criminal district court for this parish, over which your honor is the presiding judge, by operation of law the Federal court is vested with the jurisdiction of the case.

Very respectfully, your obedient servant,

(Signed) THOMAS F. MAHER,
Atty. for James Murray.

65 *The trial.*

[Extract from the minutes, February 28th, 1895.]

THE STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494. Indictment for murder.

Section B, Hon. J. C. Moise, judge.

And now comes Charles A. Butler, district attorney, who prosecutes for the State, and the defendant, Jim Murray, alias Greasy Jim, in person, being placed at the bar of the court in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq.

The witness' for the State and the defense having been called, thereupon the State and defence announced to the court that they were ready to proceed to trial, counsel for defendant reserving the right to attachments for absent witnesses.

The following-named jurors, to wit, Frank Emmett, Thomas J. Sully, jr., C. W. Gruber, W. M. Losch, Emile Espenan, Henry Gassuer, Jonas Lehman, Claude M. Smith, Ernest Dusse, W. D. Gardiner, J. B. Byrne, E. Jordy, were then regularly sworn and examined upon their voir dire, accepted, empaneled, and sworn to serve as such in this case, during which examination two were challenged by the State, seven were challenged by the accused, eight were challenged for cause, and four were excused by the court.

The indictment, together with the finding of the grand jury therein, the endorsements thereon, and the plea of the defendant thereto, having been read to the jury herein empaneled and sworn, the State then submitted to counsel for defendant the coroner's process verbal, to which said counsel made no objections, and the said process verbal was
66 then offered in evidence and read to the jury by the State. Charles Usher, Dr. A. G. Maylie, assistant coroner for the parish of Orleans, Rebecca Mason, Isaac Williams, A. Rosewaite, A. D. Vergets, Joseph Faber, Charles Shaffer, Corporal Rawlings, Detective Flood, Capt. John Journee were sworn and examined as witnesses on part of the State, during which examination of Dr. Maylie and Corporal Rawlings certain leaden balls were show' to said witnesses, identified, and offered in evidence, and exhibited to jury by the State.

Counsel for defendant having cross-examined each of the aforesaid witnesses, excepting Dr. A. G. Maylie, Corporal Rawlings, and Capt. John J. Journee, and the court having examined the witness A. Rosewaite, Deputy Sheriff John McNeal was then sworn and examined by the State with reference to absent witness, King Jones, whereupon the State offered in evidence herein the testimony of said absent witness, King Jones, taken before the recorder, to which counsel for the defendant objected; and the court, having heard argument thereon, then ruled said testimony admissible, to which ruling of the court counsel for defendant excepted, and, with the consent of the court, reserved the right to file a bill of exceptions.

The State then read said testimony of King Jones, the absent witness, to the jury. The court then ordered a recess to be taken until 7.30 o'clock this p. m., the hour being then 5.30 o'clock this p. m.

The jury, having been cautioned by the court, were retired in care of the sheriff, to be well and truly kept together during said recess. Afterwards, to wit, the hour of 7.30 this p. m. having arrived, the
67 defendant herein was placed at the bar of the court in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq., and the State being then and there represented by Charles A. Butler, district attorney. The jury herein impaneled and sworn were then returned into open court, attended by the proper officer of this court, having been well and truly kept together during the aforesaid recess. The jury was then polled and announced complete. The State then offered in evidence a subpœna directed to the aforesaid absent witness, King Jones, together with the return of the sheriff thereon; also a certain letter and telegram from the sheriff of Mobile, Ala., all of which was objected to by counsel for the defendant, said objections being overruled by the court, to which ruling of the court counsel for defendant excepted, and, with the consent of the court, reserved a right to file a bill of exceptions. The State then announced the case closed.

Geo. Van Dervort, Detectives Flotte, J. H. Littleton, R. B. Stubbs, De Rance, Kerwin, Rainey, Roach, and Capt. Malone, Chief D. S. Gaster, H. J. Seaferth, T. J. McCarthy, D. C. O'Malley, T. D. Wharton, Recorder A. M. Aucoin, Charles Usher, and the defendant, in his own behalf, were sworn and testified on part of the defence, and were cross-examined by the State. Counsel for defendant then announced that the case on the part of defendant was closed. Detective Flood and Chief D. S. Gaster were then recalled and examined in rebuttal and were cross-examined by counsel for defendant. Thereupon the State opened argument, and was followed in argument by counsel for defendant, the argument being then closed by the State. Whereupon the court
68 read from a written charge to the jury. After hearing the evidence, argument, and instructions of the court, the jury retired to consider of their verdict, and, having duly considered of the same, returned into open court attended by the proper officer of this court and presented to the court the following verdict, to wit:

New Orleans, March 1st, 1895. Guilty. Signed, Claude M. Smith, foreman.

Whereupon counsel for defendant having expressed a desire, the court ordered that the jury herein be polled; and the names of the said jurors being called, each of whom, after hearing the aforesaid verdict read, then and there announced the same to be his verdict, the court ordered the verdict herein rendered to be recorded, the jury discharged from further consideration of this case, and the accused remanded to await sentence.

69 *Charge of the court to the jury. Delivered and filed March 28th, 1895.*

STATE OF LOUISIANA
vs. No. 22494.
JIM MURRAY, ALIAS GREASY JIM.

Section B, criminal district court, Hon. J. C. Moise, judge.

GENTLEMEN OF THE JURY: The prisoner at the bar is presumed to be innocent until he is proven guilty. The consequence of this rule of

law is, he is not required to prove his innocence, but may rest upon the presumption in his favor until it is overthrown by positive affirmative proof. The onus is therefore upon the State to establish to your satisfaction beyond any reasonable doubt the guilt of the prisoner as to the crime charged in this indictment or any lesser one included in it. If you entertain any reasonable doubt as to any fact or element necessary to constitute the prisoner's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal.

This doubt must be a reasonable one—that is, one founded upon a real, tangible, substantial basis, and not upon a mere caprice, fancy, or conjecture. It must be such a doubt as would induce action without hesitation in an important matter by men of ordinarily prudent judgment. It must be such a doubt as would make you feel you had not an abiding conviction as to the prisoner's guilt. If, after giving a fair and impartial consideration to the facts of the case, you find the evidence unsatisfactory upon any point indispensably necessary to constitute the prisoner's guilt, this would give rise to such a reasonable doubt as would justify you
70 in rendering a verdict of "not guilty." You are prohibited by law and your oath from going beyond the evidence to seek for doubts upon which to acquit or convict the prisoner, but must confine yourself strictly to a dispassionate consideration of the testimony given upon the trial. You must not resort to extraneous facts or circumstances in reaching your verdict.

You are the exclusive judges of the facts. You find from the evidence what facts have been proven and what facts have not. For this purpose you determine the credibility of the witnesses and the weight to be give' to their testimony. You have the right to accept as true or reject as false the testimony of any witness, accordingly as you are impressed with his veracity. You may take into account his manner on the stand, the probability or improbability of his statements, the interest or want of interest he may have in the cause, and every circumstance surrounding the giving of his testimony which may aid in weighing his statements.

You are also the judges of the law. You are the judges of the law in the same sense as you are the judges of the facts—you receive the one from the witnesses, you receive the other from the court. The court will instruct you as to those principle' of law applicable to that theory of the case contended for by the prosecution, and also as to those principle' of law applicable to that theory of the case contended for by the defence, and you are to judge as between those several principles of law which are applicable to the facts of the case.

The prisoner is permitted by law to testify in his own behalf. If he exercises this privilege he is governed by the same rules of evidence as every other witness. You may test his veracity as you would test
71 the veracity of any other witness, having the right to believe or disbelieve him, just as he impresses you as to the truth or falsity of his testimony.

We are now to consider the nature and the character of the crime for which the prisoner is being tried; what are its ingredients and what are the essentials necessary to constitute it.

Murder is the felonious killing of a human being with malice aforethought, either expressed or implied. The first essential condition in a trial for murder is the establishment of the following requisites, called in law the corpus delicti: First, the deceased must be shown to have died from the effects of the wound, and second, that said wound was unlawfully inflicted by the accused.

The next essential is, the killing must have been done through malice, either expressed or implied. Malice is either special or general. It is special when borne towards a particular individual. General malice is defined to be an abandoned, depraved, malignant spirit; a heart devoid of all sense of social duty and fatally bent on mischief. It involves all those unlawful promptings of the human heart, such as anger, hatred, jealousy, revenge, etc. A killing under the influence of malice will be murder.

Malice expressed is where the deliberate intention to take life is manifested by external circumstances capable of proof. That is to say, where the premeditated design to take life has been disclosed by certain facts susceptible of being established by positive proofs. As an illustration, I cite such cases as where a person layed in wait for his victim,
72 antecedent menaces and threats, former grudges, and in general all acts in prepar'tion or preconcerted schemes to carry out the unlawful purpose, arming himself beforehand, etc.

Implied malice is where the killing is malicious, but there are no external signs or premeditation beyond the mere fact of the killing. The law presumes a killing to be malicious where there are no just grounds for it. Where the killing was without provocation, or upon such slight provocation as not to justify it, malice is implied. It is implied in any deliberate cruel act committed by one person against another, however sudden. If a man armed with a deadly weapon, such as a pistol, should suddenly and with little or no apparent cause or provocation shoot and slay another, it is a conclusion based upon human experience that he would not commit so outrageous an act except under the influence of malice. Where one is killed in consequence of such a wilful act, disclosing in the perpetrator no sense of respect for human life, we are reasonably led to infer a general malice from such a depraved inclination to wrong. That is what the law means by malice implied. A human being unlawfully killed by one under the influence of such malice in the eyes of the law would have been murdered.

I charge you further that while in order to constitute murder the law requires the killing to be wilful, deliberate, and premeditated, yet it does not require that the wilful intent should exist for any length of time before the crime is committed. It is sufficient if there was design or determination to kill distinctly formed in the mind of the slayer at any moment before, or at the time of, the fatal shot was fired.

73 It is a presumption of law that every sane man intends the natural and probable consequences of his acts, hence, if a man without any apparent cause of provocation or upon so slight a cause provocation as not to warrant it, armed with a dangerous weapon, should wilfully kill another, the law presumes such killing intentional, and it would be murder. An indictment for murder also includes the lesser crime of manslaughter.

Manslaughter is the felonious killing of a human being without malice aforethought, either expressed or implied. It is distinguished from murder by the absence of malice. It involves no element of deliberation whatever. In order to constitute the crime there must have been a serious, highly provoking injury inflicted upon the accuse' sufficient to excite an irresistible passion in a reasonable person or an attempt by the person killed to commit a serious personal injury upon the accused. The killing must be the result of the sudden impulse of the passion supposed to be irresistible, and induced by the intensity of the provocation. The provocation for the blow must have arisen at the time the blow was struck, so that the passion was not the result of a former provocation; that such passion was either from sudden rage, resentment, or terror, which rendered the defendant incapable of cool, calm reflection upon the character and result of his acts, and that the act was directly caused by the passion arising out of such a' immediate provocation. Thus, you will observe, it is not alone the sudd'ness of the killing tha' constitutes this crime, but there must have been also a serious and highly provoking injury immediately preceding it and which induced the unl'wful act.

74 I charge you further, gentlemen of the jury, that if a man unlawfully attempts to kill or inflict great bodily harm upon one against whom he bore a special malice, but failed, and unfortunately killed an innocent third person, such killing would in law be murder, and the accused could not be absolved from legal responsibility on the ground of accident.

Where a man has so little respect for human life that he maliciously seeks to destroy it it makes no' difference who may be the victim of his mortal blow to constitute such homicide murder. Nor will the law permit a malicious killing, though the real and intended victim escaped, to be successfully defended by the plea that the wrong man was killed.

If such a defence were recognized as legal and sound the vilest murderer could successfully elude the punishment of the law by stating that he did not intend to kill the deceased, but intended to kill or inflict great bodily harm upon some other. Such false pretenses would be a common defence.

I charge you further, if the circumstances surrounding the killing were such that it would have constituted the crime of manslaughter had the intended victim been killed, then, if the deceased were not such intended victim, but some other, such killing would be manslaughter. In other words, w'ere the intended killing would be murder, killing the wrong man would also be murder; where the intended killing would be manslaughter, killing the wrong man would also be manslaughter. You are further charged, gentlemen, that if a pistol was accidentally discharged in the hands of one doing a lawful act, and as a result a

75 person was killed, such accident would be a good defence to the charge of murder and manslaughter. But if an accused was in the act of doing an unlawful act with malicious intent, such, for instance, as drawing a pistol for the purpose of wilfully, feloniously, and maliciously killing or inflicting great bodily harm upon another by shooting him, and in the unlawful attempt to carry out this intention the pistol was involuntarily discharged, taking effect upon and killing an innocent third person, such killing would be manslaughter.

You may find one of the following verdicts, accordingly as you find the facts:

1. You may find the prisoner at the bar "guilty" in the manner and form as charged in the indictment, in which case the penalty will be death.

2. You may find the prisoner at the bar "guilty" without capital punishment, in which case the penalty will be imprisonment at hard labor for life.

3. You may find the prisoner at the bar "guilty" of manslaughter, in which case the punishment will be a fine not exceeding $2,000 and imprisonment at hard labor for a term not exceeding twenty years.

4. You may find the accused "not guilty," in which case he will be discharged.

You will select your own foreman, and write your verdict on the back of the indictment, dating it, and your foreman will sign it in his capacity as such.

76 *Motion for a new trial, March 7th, 1895.*

STATE OF LOUISIANA
vs.
JIM HENRY, ALIAS GREASY JIM. } No. 22494.

Criminal district court for the parish of Orleans, Section B.

On motion Thomas F. Maher, attorney for accused, and upon suggesting to the court that the verdict of the jury in the above-entitled cause is contrary to the law and the evidence, and ought to be set aside and a new trial granted, on the following grounds, to wit:

That the accused did not have a fair and impartial trial, and that he did not have the benefit of such a fair and impartial trial as intended by the 14th amendment to the Constitution of the United States, and his civil rights thereunder, in this, to wit:

That the venire that formed the tales jurors, out of which he was forced to select the petty jurors which tried him, were all white men, and that not one of said venires was of the color or race of the prisoner, although there is nearly 6,000 citizens of his race and color possessed of the legal qualifications requisite, under the constitution of Louisiana and the jury act under which he was tried, to perform service as jurors in this parish, almost seventeen per cent of the registered voters of the parish of Orleans. Misconduct on the part of the jury which tried him, in this, that on the trial of his case, after all the testimony of the witnesses of the State and defence had been heard and argued, and just as the court was about to charge the jury, Juror Claude M. Smith arose from his seat in the
77 jury box, in open court, and asked the court if he could, for his satisfaction, and for other members of the jury, get certain information. The court stated that the jury had not yet been charged. The court read the charge to the jury, at the conclusion of which Juror Smith again rose in his seat and said to the court that he and others of the jury was anxious to hear evidence as to the height of the deceased. The district attorney said he had no objections.

Counsel for accused said he was opposed to the reopening of the case, as such a proceedings was irregular and contrary to law and criminal pleadings, after argument and charge of the court to the jury; that the request of Juror Smith, who was subsequently elected foreman of the jury, established the fact that a discussion of the case had taken place between the members of the jury previous to the case given to them for deliberation, contrary to and in *this*regard of the instructions of the court, that they were not to discuss the case until it was finally closed and submitted to them for deliberation.

That it is a conclusion of fact from the remarks of Juror Smith that doubt existed in some of the minds of the jurors as to the guilt of the accused, the benefit of which doubt the jury failed to give to the accused, as instructed by the court.

That the refusal of counsel for accused to permit testimony to be heard relative to the height of the deceased at a stage of the proceedings which, in his opinion, was not regular and proper angered the jury and built up in their mind a bias and hostile feeling against the accused, and that this incident actually control'ed and determined the verdict to the
78 prejudice and injury of the accused.

That the jury did not consider with proper attention the testimony of the accused explanatory of the shooting when he stated that he saw the man King Jones who had several times caused his arrest; that his passion had gotten the better of him, and that he attempted to draw his pistol, with the purpose of crippling his tormentor, when the weapon got caught in his suspender, and the cylinder broke, and the pistol exploded. In support of this testimony witnesses for the State swore that two loaded shells, and one exploded pistol shell was found at the scene of the shooting, and at the point where they saw the flash of the pistol, and where Private Watchman Carter was shot, coupled with the evidence of all the witnesses that when the accused was arrested by the deceased and the witness named Usher, he offered no resistence and walked quietly two blocks—two whole squares in a different direction from the route which lead to the nearest police station for the purpose of identification. That the catching of the weapon in the suspenders of the accused and the breaking open of the cylinder was an intervening circumstance that interfered with his original purpose and design to kill or do great bodily harm to King Jones, and destroyed what the law regards as implied malice, in so far as the death of the deceased occurred.

That the court erred in instructing the jury that they were exclusive judges of the facts. The instructions should have been under the jurisprudence of this State, that they were the judges of the law and evidence. The subsequent charge of the court in another paragraph, in qualified terms, that they were judges of the law in the same sense that
79 you are the judges of the facts is not in accord with the decisions of the supreme court and this part of the charge was calculated to confuse the jury.

That the court erred in using the pronoun "we are to consider, etc.," in the instructions to the jury, as its use was inclusive of I (the court) and others, when the pronoun "you" should have been, used as the jury in a legal sense occupies a collection of persons, as an individual body, and

this part of the charge could not otherwise than lead the jury to infer that the court and others took part in their deliberations, to the great injury of the accused.

The court erred in charging that if a man unlawfully attempts to kill or inflict great bodily harm upon one against who' he bears a special malice, but fails and kills an innocent third party, such killing in law would be murder, and the accused could not be absolved from the legal responsibility on the grounds of accident. This part of the court's charge to the jury is erroneous, as the original intent and design could have been interfered with either by a third person or circumstances, and the killing would not be murder because it includes cases of accidental homicide.

It is ordered by the court that Charles A. Butler, district attorney, who prosecutes this case for the State, do show cause on day of March, 1895, why a new trial should not be granted.

(Signed) THOMAS F. MAHER,
Atty. for Mover.

James Murray, being sworn, doth depose and say to the best of his knowledge and belief the reasons assigned in the foregoing motion for a new trial are true and correct.

(Signed) JIM MURRAY.

Sworn to and subscribed before me this 7th day of March, 1895.

(Signed) A. J. DESMOND, *Minute Clerk.*

80 *Motion in arrest of judgment. Filed March 7th, 1895.*

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court in and for the parish of Orleans, Section B.

On motion of Thomas F. Maher, counsel for accused, and on suggesting to the court that death sentence can not be imposed upon the accused by this court for this reason, that under the provisions of section 641 of the Revised Statutes of the United States the accused filed in this court a petition for removal of cause to the circuit court of the United States for the circuit and district of Louisiana, and subsequently had filed and docketed in said circuit court a petition in strict conformity with section 641 of the Revised Statutes of the United States, under and by virtue of its provisions this court was divested of jurisdiction. A certified copy of the petition filed in the circuit court of the United States is hereto annexed and made part hereof. Mover prays that the judgment of this court be arrested and the trial of the accused and the verdict of the jury be declared a nullity, and that the accused be turned over to the circuit court of the United States for the circuit and district of Louisiana, and his case proceeded with according to law and in conformity with the provisions of section 641 of the Revised Statutes of the United States and his civil rights thereunder and for general and equitable relief.

(Signed) THOMAS F. MAHER,
Atty. for Mover.

81 *Petition to the U. S. circuit court annexed to and made part of motion in arrest of judgment.*

To the honorable the circuit court of the United States for the circuit and district of Louisiana:

The petition of James Murray, to whose name the State authorities have added the alias of Greasy Jim, a native-born American citizen of the African race and color, with respect, represents: That he is now in the custody of the criminal sheriff of the parish of Orleans, State of Louisiana, under an indictment for the crime of murder; that his case has been allotted to Section B of the criminal district court of the parish of Orleans, State of Louisiana.

Petitioner avers that he filed a petition for removal of cause in the criminal district court of the parish of Orleans, State of Louisiana, to this honorable court on the 19th day of February, 1895, when he was brought before the bar of the said State court to plead to the indictment; that he alleged under oath in said petition in substance that the indictment was presented to the State court by a grand jury which was qualified by the jury commissioners of the parish of Orleans during the month of September, 1894, under the provisions of act No. 170 of the acts of the State of Louisiana of 1894, and selected and impaneled by Section A of the said State court.

That the said jury commissioners to whom, under the said act of the legislature of the State of Louisiana, the power was given to qualify citizens for jury service in the parish of Orleans, State of Louisiana, violated the 14th amendment to the Constitution of the United States by
82 failing to summon before them for qualification citizens of the race and color of petitioner in compliance with the articles of the constitution of the State of Louisiana and the jury laws in conformity therewith; that the said jury commissioners, by their said illegal action and conduct, have excluded from jury service citizens of the race and color of petitioner, although they are possessed of all other legal qualifications requisite under the constitution of the State of Louisiana and the jury laws thereof, as well as the Constitution of the United States, to serve as grand jurors; that said jury commissioners did illegally confine their summon and qualification for jury service to white citizens only, and there is no criminal statute in the State of Louisiana to coerce or punish them for this illegal discrimination on account of race, color, etc.

That act No. 170 of the acts of the legislature of the State of Louisiana of the year 1894, creating, qualifying, and organizing the grand jury which indicted him, is unconstitutional in this, that the said act has omitted the compliance clause of the 14th amendment to the Federal Constitution, provided for in all other jury laws of the State of Louisiana since the adoption and ratification of the amendments.

That the right secured to him by the constitution of the State of Louisiana and the law providing for the equal rights of all citizens of the United States was denied to him by the State court, in this, to wit: That on the 10th day of January, 1895, counsel for petitioner filed a challenge to the grand jury which indicted him, which was ordered filed by the State court, subject to argument on face of papers, and accompany-

ing the said challenge a motion for a subpœna duces tecum on
83 the registrar of voters and jury commissioners, officials of the State of Louisiana, to furnish evidence or information in their possession as public officials to support as proof the challenge to the grand jury. Said motions for subpœna duces tecums, which petitioner swore were necessary and material for his defense, were refused by the said State court. That the act of the said State court was a judicial act, and depriving him of due process of law and compulsory process to obtain witnesses in his favor, in violation of articles of the constitution of the State of Louisiana, and denying to him the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States.

Petitioner aver'ed that the man who he is charged with having murdered is a white man, and that the local prejudice is of such a strong character against his obtaining a fair and impartial trial (independent of the merits of the case, and based upon the fact that he is a colored man) in any court of the State of Louisiana, to which his case could be removed, by this state of facts, newspaper publication in the Times-Democrat of Dec. 16th, 1894, and the Daily Item of February 3rd, 1895, and other dates, Daily States (leading journals published in the city of New Orleans, State of Louisiana), with a large circulation and powerful influence on the mind' of their readers, and the articles published of such a hostile and inflam'atory character as to cause the prejudging of his case before trial, said publications being read and discussed by citizens who will form his jury in said State court; that he can not have the full and reap the equal benefit
of all the laws and proceedings in the State courts in the State of
84 Louisiana, as is enjoyed by other citizens, and that he has less chance of enforcing in the State courts of Louisiana all of his rights in this prosecution, as a citizen of the United States, and there is a probability of a denial to him of his said rights on every trial which may take place upon the indictment against him in the State courts in the State of Louisiana.

Petitioner further avers that he requested the judge of Section B, of the criminal district court of the parish of Orleans, State of Louisiana, to fix a day for the argument of the said petition for removal of cause to this honorable court, and allow him an opportunity to summon witnesses in support of the allegations contained therein, to which request the judge of the said State court would not entertain, to which ruling counsel for petitioner reserved a bill of exceptions.

Petitioner avers that he was forced to join issue with the State of Louisiana on his plea of not guilty.

Petitioner avers that the judge of the said State court is a constitutional officer of the State of Louisiana, and that he was acting as the agent of said State, by virtue of his official position under the government of the State of Louisiana, and that his act, in refusing to give petitioner an opportunity to summon witnesses and hear argument on his petition for removal of cause, was the act of the State of Louisiana, depriving your petitioner of his right of due process of law, and denying to him the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States and his civil rights thereunder.

85 Petitioner further avers that he applied to the clerk of the criminal district court for the parish of Orleans, State of Louisiana, in conformity with section 641 of the Revised Statutes of the United States, for a copy of the pleadings, etc., of his case in the State court. The certificate of the said State court is hereto annexed and made part hereof.

Petitioner further avers, on the 21st day of February, 1895, his counsel was served with a notice that the trial of his case was fixed in Section B of the criminal district court of the parish of Orleans, State of Louisiana, for Thursday, February 28th, 1895, as will more fully appear by the notice hereto annexed and made part hereof.

Petitioner avers after the filing of his petition for removal of cause to this honorable court under section 641 of the Revised Statutes of the United States, that the State court was divested of jurisdiction and any further proceedings taken in the State court was contrary to the laws of the United States.

Wherefore, the premises and affidavit being considered, your petitioner prays that *he* be allowed to file this petition and that the clerk of this honorable court issue to the marshal of this court a writ of habeas corpus cum causa, ordering and commanding him to take into his custody the body of petitioner to be dealt with in this court according to law, and that a writ of certiorari and prohibition issue from this honorable court, directed to the honorable James C. Moise, judge of Section B, of the criminal district court, of the parish of Orleans, State of Louisiana, and the honorable Charles A. Butler, district attorney for the parish of Orleans, State of Louisiana, enjoining them or either of them from further proceed-

86 ings in the case of the State of Louisiana, Jim Nurray, alias Greasy Jim, No. 22494, of the docket of the criminal district court of the parish of Orleans, State of Louisiana, or assuming any further jurisdiction or further proceedings in this case until judgment shall be pronounced by this honorable court on the regularity of the proceedings in the State court, and for all other orders that this court is competent to grant for general and equitable relief.

(Signed) THOMAS F. MAHER,
Atty. for Petitioner.

James Murray, petitioner herein, doth depose and say that the allegations contained in the foregoing petition are true and correct, and that he is a poor colored man; that he applied to the honorable the circuit court of the United States for the circuit and district of Louisiana to defend his suit in forma pauperis.

(Signed) JAMES MURRAY.

Sworn to and subscribed before me this 23d day of February, 1895.

(Signed) W. H. SEYMOUR,
Notary Public, Orleans Parish, Louisiana.

Personally came and appeared before me James Murray, who, first being duly sworn, doth depose and say that he is a citizen of the United States; that because of his poverty he is unable to pay the costs of the suit and action which is about to commence, or give security for the same, and

that he believes he is entitled to the redress he seeks such suit and action. The said action is one praying framed for a writ of habeas corpus.

(Signed) JAMES MURRAY.

Sworn to and subscribed to before me this 25th day of February, 1895.

[SEAL.] (Signed) WM. H. SEYMOUR,
Notary Public, Orleans Parish, Louisiana.

87 *Order.*

Considering the affidavit of the petitioner as to his poverty and consequent inability to either make, deposit, or give security for costs, it is ordered that he be permitted under the act of Congress in such case made and provided to institute this proceeding in forma pauperis.

(Signed) CHARLES PARLANGE, *Judge.*

NEW ORLEANS, *February 26th, 1895.*

Circuit court of the United States, eastern district of Louisiana, clerk's office.

I, Edward R. Hunt, clerk of the said court, do hereby certify the foregoing to be true copy of the original petition of James Murray praying for a writ of habeas corpus and order thereon. I further certify that said petition was docketed as No. 12380 on the docket of this court and filed February 26th, 1895.

Witness my hand and seal of said court, at the city of New Orleans, this 6th day of March, 1895.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Section B, criminal district court for the parish of Orleans.

STATE OF LOUISIANA
vs. } No. 22494.
JIM MURRAY, ALIAS GREASY JIM.

I, William J. McGeehan, clerk of the criminal district court, parish of Orleans, do hereby certify that I have been requested by Thomas F. Maher, of counsel for the defendant, in the above entitled and numbered cause, to prepare a transcript of the record of the said case, and this office is at present engaged in said preparation, and which is not yet completed; it will require at least two days longer in which to furnish the transcript.

[SEAL.] (Signed) W. J. MCGEEHAN,
Clerk of the Criminal District Court for the Parish of Orleans.

88 *Motion for a new trial refused. Motion in arrest of judgment refused. Sentence of the accused.*

[Extract from the minutes, March 7th, 1895.]

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Section B, criminal district court, Hon. J. C. Moise, judge.

The defendant, Jim Murray, alias Greasy Jim, in person being placed at the bar of the court in custody of the sheriff, attended by his counsel, Thomas F. Maher, esq., thereupon said counsel presented to the court a motion for a new trial herein, which was ordered filed; and the court having heard the said motion, for reasons orally assigned, overruled the motion for a new trial herein, to which ruling of the court counsel excepted, and with consent of the court reserved a right to file a bill of exception. Counsel for defendant then presented to the court a motion in arrest of judgment herein, which was ordered filed; and the court having heard said motion, for reasons orally assigned, the motion in arrest of judgment herein was overruled, to which ruling of the court counsel for defendant excepted, and with the consent of the court reserved a right to file a bill of exceptions; whereupon the defendant being caused to stand, and having nothing further to say to the questions as propounded by the court, the said Jim Murray, alias Greasy Jim, the court sentenced him, the said Jim Murray, alias Greasy Jim, for his such crime of murder as follows, to wit:

Considering the verdict of the jury and section 784 of the Revised Statutes you shall be remanded to the parish prison from which
89 you came and there, at such time as the governor of this State shall appoint in his warrant, I sentence you to be hanged by the neck until you are dead, and may God have mercy on your soul.

Motion and order for suspensive appeal. Filed and granted March 11th, 1895.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Section B, criminal district court for the parish of Orleans.

On motion of Thomas F. Maher, attorney for accused, and upon suggesting to the court that there is error in the verdict of the jury and the judgment and sentence of the court in the above entitled and numbered cause to his great injury and prejudice, and he is aggrieved thereby and desires to appeal to the honorable the supreme court of the State of Louisiana from the verdict of the jury and the judgement and sentence of this court (suspensively): It is ordered by the court that a suspensive appeal be granted in the above entitled and numbered cause, returnable to the honorable the supreme court of the State of Louisiana according to law.

90 *Bill of exceptions A. Filed March 14th, 1895.*

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court for the parish of Orleans, Section B.

Be it remembered that of the 19th day of February, 1895, counsel for the accused filed, with the permission of the court, in the above-entitled cause a petition for removal of cause to the circuit court of the United for the circuit and district of Louisiana in conformity with section 641 of the Revised Statutes of the United States. The allegations contained in said petition are made part of this bill of exceptions. To the ruling of the court overruling said petition counsel for the accuse' assigns as error the deprivation of due process of law in favor of the accused, and the deprivation of his civil rights and equal rights under the law, and the violation of his civil rights under the 14th amendment to the Constitution of the United States.

Exceptor prays the court to sign this bill of exceptions and assignment of errors.

Per curiam: Rule XIV of the criminal district court for the parish of Orleans provides all bills of exception must be presented to the court for signature before the filing of a motion of new trial or before sentence. This bill was filed March 14th, '95. The motion for a new trial was filed and overruled March 7th, 1895; a motion for a suspensive appeal was filed March 11th, 1895, returnable according to law.

91 I can not conceive why this bill of exceptions and the other four marked, respectively, B, C, D, and E, should have been presented to me in violation of the rules of court and after a suspensive appeal had been taken. I would not under any circumstances than that of a capital case sign this bill; but believing it just that my rulings should be reviewed, in order to correct any error to the prejudice of this accused, his life being at stake, I do so under protest.

On the trial of the motion to remove every one of its allegations was positively disproved. The jury were not qualified, selected, or drawn under the influence of race prejudices, but when men have been discriminated against the basis of such action was the lack of intelligence, good reputation, and moral habits. Intelligent, well-behaved negroes are sometimes selected to serve on my juries.

(Signed) JAMES C. MOISE, *Judge.*

Bill of exceptions B. March 14th, 1895.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court in and for the parish of Orleans, Section B.

Be it remembered that on the 7th day of March, 1895, counsel for the defendant filed a motion for a new trial in the above entitled and numbered cause. The allegations in said motion are made part of this bill

of exceptions. The court erred in not giving the accused an opportunity to summon witnesses in support of the allegations of misconduct
92 on the part of the jury, as well as to establish by witnesses that the behavior and remarks of one of the jurors previous to the case being given to them for deliberation was a conclusion of facts that a doubt existed in their mind as to the guilt of the accused, the benefit of which doubt the jury did not give to the accused, as he was entitled to under the law and the instructions of the court, as alleged in the motion for a new trial. The court erred in not fixing a day to hear witnesses and argument on the allegations set forth in the motion for a new trial, thereby depriving the accused of his right of process of law and his constitutional rights thereunder, as well as his equal and civil rights under the Federal Constitution. Exceptor prays the court to sign these bills of exceptions.

Per curiam: I sign this bill under protest, for the reasons stated in bill A.

The juror Smith, in propounding the question, spoke for himself and not as representing the jury. Counsel assumes he spoke for the others, because subsequently he proved to be foreman.

There was no misconduct whatever.

The facts stated in the motion for a new trial are not correct. The evidence showed beyond any doubt that the prisoner intended to kill Officer Cotter, and did kill him, for the purpose of effecting his escape, and succeeded. It was not a killing by mistake or accident. I was compelled to charge the law on the subject because there was evidence of it.

(Signed) JAMES C. MOISE, *Judge.*

93 *Bill of exceptions C. Filed March 14th, 1895.*

STATE OF LOUISIANA
vs. } No. 22494.
JIM MURRAY, ALIAS GREASY JIM.

Criminal district court in and for the parish of Orleans, Section B.

The court erred in not quashing the indictment on the ground set forth in the motion to quash, that the legislature had stamped act No. 170 of the acts of 1894 as a special or local law, and the admission of the State that it had not been published in the French language as provided by law, thereby rendering said act unconstitutional. The court erred in declaring said act constitutional in opposition to the reason assigned in the assignments and bills of exceptions filed in the Heard Case and made a part of the record in this case.

The court erred in not decreeing act No. 170 of the acts of 1894 unconstitutional for the absence of the compliance clause to the 14th amendment to the Constitution of the United States, as provided for in all jury laws of this State.

Accused prays the court to sign these assignments of errors.

Per curiam: No bill was reserved to the ruling of the court refusing to quash the indictment, nor is this document presented to me for signature a bill of exceptions. I therefore can not sign it, and refuse to do so.

(Signed) JAMES C. MOISE, *Judge.*

94 *Bill of exceptions D. Filed March 14th, 1895.*

THE STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Criminal district court in and for the parish of Orleans, Section B.

Be it remembered that on the first day of March, 1895, on the trial of the above entitled and numbered cause, in the absence of King Jones, one of the witnesses for the State whose testimony was taken on preliminary examination, the State offered the evidence of said witness and placed one of the deputy sheriffs on the stand to prove that he had a subpœna for the absent witness and could not find him at the residence given. Counsel for defence stated that this was the most material witness in the case and that he was anxious that the jury should see him, as he was the party that pointed out the accused on the night of the shooting, and that he was anxious to cross-examine the witness, as the accused was not represented by counsel in the magistrate's court. Counsel for the accused objected to the testimony being read on the grounds that this being a very material witness (the most important witness in the case) the officials for the State should have shown more diligence to secure the witness in the trial court, as the evidence of the officer in charge of the subpœna was to the effect that this witness, who is a negroe, was not a permanent resident of this city, and only came here transiently. The district attorney then produced a letter and a telegram from the sheriff of Mobile to support the position of due diligence on the part of the State, and the court permitted the testimony of the absent witness to be read to the jury over the objection of the accused.

95 Exceptor prays the court to sign these bills of exceptions.

Per curiam: I sign this bill under protest for the reasons stated in bill A. I make part of this bill the sheriff's return, the telegram dated February 27th, 1895, from Dolan, chief of police of Mobile, to D. S. Gaster, the chief of police here, and the letter from the former to the latter of same date. The deputy, who had the subpœna for service, swore he could not find the man; that he did not reside here, but came here sometimes and generally stopped at the address given; that the people living at that place told him that the witness had gone to Mobile. The district attorney stated that he did all he could to find the witness and conferred with Chief Gaster in order to secure his assistance in the matter; that he cooperated with him in searching for the man, but without avail, and could not tell whether he ever would find him. The evidence of this absent and unfound witness was given in open court and he was cross-examined; it was taken in the presence of the accused, and signed by him in his presence and certified to by the recorder. It seems to me more than ordinary diligence was exercised by the district attorney to secure the absent witness.

(Signed) JAMES C. MOISE, *Judge.*

96 *Bill of exceptions E. Filed March 14th, 1895.*

THE STATE OF LOUISIANA
vs. No. 22494.
JIM MURRAY, ALIAS GREASY JIM.

Criminal district court in and for the parish of Orleans, Section B.

Be it remembered that on the 7th day of March, 1895, that after the filing and reading of a motion for a new trial and the overruling of the same by the court in the above-entitled cause, counsel for accused filed and read a motion in arrest of judgment, alleging in the same a strict compliance with section 641 of the Revised Statutes of the United States, and a copy of the petition and order for docketing the same in the United States circuit court for the circuit and district of Louisiana, and requested the court to fix a day to hear argument thereon, said motion purporting to be a clash of jurisdiction between the State and Federal courts. Whereupon the court overruled the motion in arrest of judgment against the objection of the accused and passed sentence upon him, thereby depriving him of due process of law and his constitutional rights, his civil and equal rights under the law and the 14th amendment to the Constitution of the United States.

Exceptor prays the court to sign these bills of exceptions:

Per curiam: I sign this bill under protest for the reasons stated in bill A. A motion "in arrest" can be made only for errors patent upon the face of the record. The proceedings referred to in this bill make part of this record, since the documents were filed herein, but they are not on
97 the face of this record essentials in this proceeding and hence can not be considered.

The application was for a prohibition, certiorari, and habeas corpus, as will appear from the letter to me dated February 22nd, 1895, signed by Thos. F. Maher, and made part of this bill. The circuit court of the United States evidently refused to take cognizance of the case, as no restraining order has ever been issued.

(Signed) JAMES C. MOISE, *Judge.*

98 *Clerk's certificate.*

I, Wm. J. McGeehan, clerk of the criminal district court for the parish of Orleans, do hereby certify that the within and foregoing ninety-eight pages do contain a true, correct, and complete transcript of the record and proceeding in the cause entitled "The State of Louisiana versus Jim Murray, alias Greasy Jim, No. 22494" of the docket of this honorable court.

In testimony whereof I have hereunto signed my name and caused to be affixed hereto the seal of this honorable court, on this sixth day of March, in the year of our Lord one thousand eight hundred and ninety-five, and the one hundredth and nineteenth year of the Independence of the United States of America.

[SEAL.] (Signed) W. J. MCGEEHAN,
Clerk of the Criminal District Court for the Parish of Orleans.

99 *Motion and affidavit for extension of return day of transcript to the supreme court.*

Filed March 18th, 1895. Signed Paul E. Mortimer, deputy clerk. Entered March 25th, 1895.

Supreme court of the State of Louisiana.

STATE OF LA. *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

On motion of Thos. F. Maher, attorney for accused and appellant, and on showing to the court by the annexed affidavit of the clerk of the criminal district court of the parish of Orleans that he will require twenty (20) days within which to complete the transcript of appeal in the above entitled and numbered cause:

It is ordered by the court that the appellant be granted twenty (20) days from the 19th of March, 1895, to have the transcript of appeal herein completed and filed in this court, and that the return day of appeal be extended accordingly.

Affidavit for extension of return day.

State of Louisiana, criminal district court for the parish of Orleans.

STATE OF LOUISIANA *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 22494.

Bertrand Dazet, deputy clerk of the criminal district court for the parish of Orleans, being duly sworn, deposes and says that the transcript of appeal in the above entitled and numbered cause, returnable to the supreme court of the State of Louisiana on the 20th day of March, 1895, has not been completed for the reason of pressing business and account of the transcript being somewhat long, and that an additional delay of 20 days is necessary to enable him to complete the same.

Sworn and subscribed before me this 19th day of March, A. D. 1895.

(Signed) CHAS. J. REILLY,
Deputy Clerk Criminal District Court.

100 Supreme court, State of Louisiana.

STATE OF LA. *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 11770. Transcript of appeal. Filed April 8th, 1895.

Assignments of errors. Filed 16th April, 1895.

[Continuance. Extract from minutes.]

NEW ORLEANS, *Saturday, April 27th, 1895.*

The court was duly open, pursuant to adjournment. Present, their honors Francis T. Nicholls, chief justice, Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, and Henry C. Miller, associate justices.

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM.

On motion of Mr. Pierre A. Simon, jr., and on suggesting unavoidable absence from the city of New Orleans of Mr. Milton J. Cunningham, attorney-general, and the consent in open court of Mr. Thos. F. Maher, of counsel for defendant and appellant, being considered:

It is ordered by the court that this case, set down for hearing for to-day, be continued until Saturday, 11th day of May, A. D. 1895, at 11 o'clock a. m.

101 (Endorsement:) No. 11770. Supreme court. State of La. vs. Jim Murray, alias Greasy Jim. Assignments of error. Filed 16 April, 1895. (Signed) T. Mc. C. Hyman, clerk.

101½ Supreme court of Louisiana.

STATE OF LA.
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

Now into this honorable court comes the accused, by his undersigned attorney, and assigns the following errors in the proceedings in and during the trial in the trial court, all of which errors are patent on the face of the record, to the prejudice of the accused, in the above-entitled cause.

First. Endorsement of trial court on challenge to grand jury, "Filed subject to argument on face of papers, etc.," changing the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns for error.

Second. Endorsement of trial court on motion for subpœna duces tecum on F. C. Zacharie, "Filed subject to orders" as allegations in said motion for subpœna duces tecum accused alleged that certain evidence was material to support challenge to grand jury, changing the forms of law and criminal procedure, thereby depriving the accused of due process of law and endeavoring to establish a precedent contrary to the

102 forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns for error.

Third. Endorsement of trial court on motion for subpœna duces tecum on jury commissioners, "Filed subject to orders," changing the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitu-

tional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns for error.

Fourth. The extract from the minutes of the trial court of February 5th, 1895, on resumption of argument to challenge to grand jury, in which the court rules that counsel for accused must produce proof without expecting to produce same through the court, changing the forms of criminal procedure, thereby depriving the accused of the benefit of due process of law and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder. And
103 to this decision and ruling of the trial court the accused assigns for error.

Fifth. Compelling the accused by judicial coer/ion of trial court to swear to an affidavit as to the necessity and materiality for the subpœna duces tecum on F. C. Zacharie, registrar of voters, and jury commissioners to furnish evidence in their possession in support of the allegations contained in the challenge to the grand jury, changing the form of criminal procedure, thereby depriving the accused of the benefit of due process of law and establishing a precedent contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns for error.

Sixth. Overruling of trial court of motion to quash indictment, on the grounds of the unconstitutionality of act No. 170 of the acts of 1894, to the injury and prejudice of the accused, in violation of the form of law and the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and rulings of the trial court the accused assigns for error.

Seventh. Overruling by the trial court without giving the accused an opportunity to summons witnesses and hearing of the law and
104 evidence on the petition of the application for a removal of cause to the circuit court of the United States for the circuit and district of Louisiana, thereby depriving the accused of the benefit of due process of law and ignoring the provisions of section 641 of the Revised Statutes of the United States, with the judicial purpose of treating with defiance and contempt the Federal laws on this subject, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him under the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns for error.

Eight. That the trial court should not have proceeded with the trial of the accused after notification by letter of counsel of date of February 22nd, 1895, that he was about to apply for a writ of habeas corpus cum causa, etc., by virtue of the provisions of section 641 of the Revised

Statutes of the United States. The failure of trial judge to take notice (judicially) of said notification is violative of the rights guaranteed to the accused under the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this disregard of the Federal procedure by the trial court the accused assigns for error.

105 Ninth. Overruling motion for new trial court, by trial court, without giving the accused an opportunity to summon witnesses to establish the allegations therein contained and hearing the law and evidence in support thereof, therefore changing the form of criminal procedure, thereby depriving the accused of due process of law, and a denial of justice and arbitrary ruling in violation of the rights of the accused guaranteed to him by the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns as error.

Tenth. Overruling by the trial court of m'tion in arrest of judgment, to which was annexed a certified copy of the petition filed by the accused and docketed in the circuit court of the United States for the circuit and district of Louisiana, under the provisions of section 641 of the Revised Statutes of the United States, the hasty and illegal disposition of this motion, without giving the accused an opportunity to produce law and evidence in support thereof, is an attempt by the trial court to change the forms of law and criminal procedure and arbitrary ruling and a denial of justice and due process of law, in violation of the rights of the accused guaranteed to him by the constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court the accused assigns as error.

(Signed) THOS. F. MAHER,
Att'y for Accused.

106 *Case submitted.*

[Extract from minutes.]

NEW ORLEANS, *Saturday, May 11th, 1895.*

The court was duly open, pursuant to adjournment. Present, their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, and Henry C. Miller, associates justices.

STATE OF LA.
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

This case came on this day to be heard, and was argued by Mr. Thos. F. Maher, on behalf of the defendant and appellant, and the case having been submitted by the attorney-general, Mr. Milton J. Cunningham, on behalf of the State, plaintiff and appellee upon the briefs now on file, the court took time to consider.

Final judgment.

[Extract from minutes.]

NEW ORLEANS, *Monday, June 3rd, 1895.*

The court was duly open, pursuant to adjournment. Present, their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, and Henry C. Miller, associate justices.

STATE OF LA.
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

His honor Mr. Justice Watkins pronounced the opinion and judgment of the court in the case of the State of Louisiana vs. Jim Murray, alias Greasy Jim, No. 11770, on appeal from the criminal district court of the parish of Orleans. Judgment affirmed.

107 *Opinion of the court. Filed June 3rd, 1895.*

Supreme court, State of Louisiana.

STATE OF LA.
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

108 United States of America, State of Louisiana, supreme court of the State of Louisiana.

NEW ORLEANS, *Monday, June 3rd, 1895.*

The court was duly opened, pursuant to adjournment. Present, their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

His honor Mr. Justice Watkins pronounced the opinion and judgment of the court in the following case:

109 [Mr. Justice Watkins. Monday, June 3rd, 1895. State of Louisiana vs. Jim Murray, alias Greasy Jim. No. 11770. Appeal from the criminal district court, parish of Orleans.]

Having been convicted of murder and sentenced to the extreme penalty of the law, the defendant has appealed, relying upon a variety of technical pleas, though chiefly upon the complaint that he is a colored man and that the deceased was a white man, and in the selection and drawing of the grand jury there was an unlawful discrimination against the black or colored race in favor of the white or Caucasion race, whereby he sustained an unjust deprivation of his legal rights.

First in order is defendant's bill of exceptions to the overruling of his challenge to the array. Substantially, it is that in selecting the persons whose names were placed in the jury wheel from which the grand jurors who found the bill and the petit jurors who tried and convicted him were drawn the jury commissioners violated the provisions of various State and Federal statutes, as well as various provisions of the State and Fed-

eral constitutions, in that they discriminated against citizens of the black or colored race, so that he was deprived of an equal protection of the law during the progress of the trial.

That, consequently, the indictment against him was null and void.

110 Simplified, the complaint is that citizens of African descent were excluded from the jury wheel, and consequently from participating in the trial from the commencement to the end.

This of course depended upon the proof, of which the defendant carried the burden.

The evidence fails to support the challenge.

Each of the jury commissioners was called as a witness for the purpose of substantiating the charge, but their evidence completely overthrows it. The trend of their testimony is that they had acted with perfect fairness and impartiality in the discharge of all their duties as jury commissioners, and in strict conformity to law.

That there were quite a number of names of colored men in the jury wheel at the time the venire was drawn, and that there were at least two colored men on the panel from which the grand jury who found the indictment against the defendant were chosen.

That they have never, in the performance of their duties, made any discriminations on account of race, color, or previous condition of servitude.

Defendant's counsel also called and interrogated as witnesses quite a number of deputy sheriffs who served summonses on the persons whom the jury commissioners desired to examine preparatory to jury service.

The purport of their evidence is that a large preponderance of them were constructively notified by making domiciliary service, and being unacquainted with them personally, they could not state whether they were colored or white persons.

The evidence shows that there were some persons of color who were members of the grand jury who found the bill, and it is there-

111 fore quite clear that the general venire was not exclusively composed of white persons, and it is thus made clear that colored citizens were not excluded from the venire on account of race or color.

The trial judge cited and relied upon State vs. Joseph (35 A., 905). It is quite a similar case and the same issue was therein raised and decided.

Admitting the premises arguendo, the court say:

"It is quite true that all the names which were drawn from the box were those of white people, yet it is not established by any testimony in the record that all the three hundred names in the general venire box were those of white people. This is distructive of defendant's theory, because he had the chance of some colored persons being drawn from the box, unless it was exclusively made up of the names of white persons. And in addition to this argument is the fact, sworn to by one of the jury commissioners, that people of African descent were not excluded from the venire box on account of their race or color."

There is no question in our minds of the correctness of the trial judge's ruling.

With regard to the defendant's complaint as to the action of the court with reference to his motions for a subpœnas duces tecum on the registrar of voters and the jury commissioners nothing need be said, because they

cut no figure in the case, since the testimony, which was elicited from the witnesses clearly, show that his challenge to the array was groundless. As these subpœnas could not have practically affected the result in the face of the positive testimony adduced on the trial of the motion, it might be conceded for the argument that the proceedings under them were irregular, though such is not the case by any means, as the subpœna directed to the jury commissioners shows that it was
112 intended only as a means of eliciting information and not for the purpose of obtaining books and papers, which were particularly described therein.

Defendant's counsel retained a bill to the judge's refusal to quash the indictment on the ground that act No. 170 of 1894, under the provisions of which the grand jury was drawn, is unconstitutional, null, and void, it being a local or special law and not enacted according to constitutional requirement by giving previous public notice.

The act drawn in question purports to be an amendment and reenactment of section 2 of act 98 of 1880 to organize the criminal district court of the parish of Orleans, in pursuance of article 130 of the constitution of the State, to create a board of jury commissioners, and for other purposes.

Immediately after the title of this amendatory act comes this prefatory clause, viz:

"Whereas due proof has been made that notice of intention to apply for the passage of this act has been published in accordance with the provisions of article 48 of the State constitution," &c.

The provisions of article 48 of the constitution are as follows, viz:

"No local or special laws shall be passed on any subject not enumerated in article 46 of the constitution unless notice of the intention to apply therefor shall have been published, without cost to the State, in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the general assembly of such bill, and in the same manner provided by law for the advertise-
113 ment of judicial sales."

"The evidence of such notice having been published shall be exhibited in the general assembly before such act shall be passed, and every such act shall contain a recital that such notice has been given."

This amendatory statute appears to strictly conform to the foregoing constitutional requirement in every particular; and its recitals must be accepted as the final and conclusive proof of such notice of intention having been given, and that such proof was "exhibited in the general assembly" before the passage thereof, there being no charge of fraud or ill-practice in procuring its enactment.

No extrinsic proof is admissible for the purpose of contradicting the recitals contained in a legislative act. (State ex rel Morris vs. Mason, 43 A., 590.)

But we think it evident that the amendment must follow the conditions of the statute that is thereby amended; and it was held and interpreted by this court not to be a local or special law. (State vs. Dalon, 35 A., 1141.)

In treating the question here raised the court there said:

"It has no private or local good in view, but aims solely at the enforcement of the laws enacted for the prevention and punishment of crime. It is a public, a general act, which regulates the common good of each and every member of the human family within the limits of the State.

"The words 'local' or 'special' are clearly used in contradistinction of the word 'general.'

* * * * * * *

"A moment's reflection satisfies the mind that the intention to
114 apply alluded to can only mean that of private individuals seeking some private advantage or advancement for the benefit of private persons or property within a certain locality.

"It is manifest that the act assailed was one of indispensable necessity to put in motion a court created by the constitution, and which, without such legislation, would have remained lifeless and cumbersome."

We can but regard that reasoning sound and the authority of that decision complete.

On neither proposition can defendant's complaint be sustained. The judge below correctly declined to sustain the alleged unconstitutionality of the law, and properly maintained the indictment.

Immediately after the defendant's motion to quash was overruled his counsel filed a motion to transfer the cause to the circuit court of the United States, which is exclusively based upon the grounds assigned in the challenge to the array of grand jurors and other rulings of the court previously discussed.

This motion was at once overruled and the transfer of the cause refused.

This refusal was a matter of course, in view of the previous rulings of the court below, which we have found correct and approved.

Had we, on the other hand, ascertained the fact to be that the jury commissioners were guilty of illegal discrimination against citizens of African descent within the sense of Federal statutes and Constitution, our ruling would have been different and the motion to transfer unnecessary.

After the trial was completed a motion for a new trial is made substantially upon the same grounds as those already gone over, coupled with a criticism of the written charge of the court to the jury.

115 Of course the correctness of the rulings of the trial judge on the propositions enumerated necessarily draws to it the correctness of the judge's declination to grant a new trial predicated on the theory that his rulings were erroneous; and we have uniformly held that unless exception has been first taken to the charge of the court, objections urged for the first time in a motion for a new trial will be of no avail.

At this juncture in the proceedings counsel for the defendant tendered a motion in arrest of judgment, based on the ground that he having filed a motion to transfer this cause into the circuit court of the United States, under and by virtue of section 641 of the Revised Statutes of the United States, and having subsequently filed and docketed said petition in said circuit court conformably to law, this court is not possessed of jurisdiction or authority any further to proceed in the cause. And thereupon defend-

ant's prayer is that the judgment of the court a qua be arrested; that the trial and verdict be declared a nullity, and that he be surrendered to the circuit court in order that the cause be therein proceeded with according to law.

The question here presented, so far as the jurisdiction and authority of the court a qua is concerned, goes back to the challenge to the array again. If the challenge was causeless, all subsequent proceedings were, necessarily, legal and jurisdictional—ultimately subject to such decision as the Federal tribunals may make in the premises.

We must deal with the issues presented, and, in our view, there is nothing in them to justify the conclusion that the court a qua did not have full and complete jurisdiction. The motion in arrest was correctly refused.

Having examined this case with the care required in a case
116 involving the life of a human being, we have reached the conclusion that there is no error in any of the rulings defendant has complained of. But we can not refrain from applauding the zeal and vigor with which counsel for the defendant has defended the accused. Judgment affirmed.

The judgment having become final, the foregoing is a true copy of the opinion and judgment rendered in the case of State of Louisiana vs. Jim Murray, alias Greasy Jim, No. 11770. Clerk's office, New Orleans, La., 1895. Clerk.

SYLLABUS.

(1) Notwithstanding all the names which are drawn from the jury wheel were those of white persons, if proof be not administered that all the names therein were of white people, the theory of the defendant, a colored person, that discrimination against his race was resorted to on account of race, color, or previous condition of servitude can not be of avail. And proof being made of the fact that persons of African descent were not excluded from the general venire, but, on the contrary, that some colored people were included therein, the charge that the accused has been deprived of due protection of the law is unfounded.

(2) Act 170 of 1884, being an amendment of section 2 of act 98 of 1880, is not a local or special law in the sense of article 48 of the constitution, the constitutionality of the original act having been affirmed by this court.

117 (3) Other bills of exception taken to rulings of the trial judge already affirmed and approved need not be again analyzed.

(4) That a motion to transfer a cause to the circuit court of the United States has been made and overruled does not divest the court of first instance of jurisdiction; nor can a petition to same effect subsequently filed in the circuit court of the United States have that effect.

118 *Petition for rehearing. Filed June 8th, 1895.*

Supreme court, State of Louisiana.

STATE OF LA.
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

To the honorable the supreme court of the State of Louisiana:

The petition for rehearing of James Murray, alias Greasy Jim, with respect represents:

That there is error to his prejudice in the judgment and decree of this honorable court in this, to wit:

In the assumption of the court, under the peculiar status of this case in the trial court, that the onus probandi was on the defendant, when, as a matter of fact, the court a qua refused to the defendant due process of law, whereby the allegations set forth in the challenge to the grand jury would have been sustained, thereby depriving the defendant of due process of law and compulsory process, as provided for in his favor under the constitution of this State and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder.

That the court erred in accepting the testimony of the jury commissioners in the Heard Case, as proof in this case, as the record shows that this tender of proof was made by the State and not the defendant, the jury commissioners not being witnesses for defendant, nor their evidence taken in the Heard Case in another court.

That the court erred when it states that defendant' counsel also called and interrogated as witnesses quite a number of deputy sheriffs who served summons', etc., when, as a matter of fact, no deputy sheriffs were summoned by the defendant nor any testimony given by them in this case.

The court erred when it asserts that there were some persons of color who were members of the grand jury who found the bill, etc., when, as a matter of fact, the record shows, at p. 9, 10 of transcript, the admission of the State that the grand jury which indicted the accused were all white persons.

119 The court erred in confounding the Heard Case with this case.

The trial judge in this case never cited and relied upon State vs. Joseph (45 A., p. 905).

The trial judge in this case never gave any written reasons for overruling any of the pleas of the defendant.

The court erred in asserting that the defendant's complaint as to the action of the court with reference to his motions for subpœna duces tecum on the registrar of voters and the jury commissioners, "cut no figure in the case," and not decreeing the issuance of these processes as a legal right which the defendant was entitled under the constitution of this State and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and the instrument of legal evidence in establishing his allegations in the challenge to the grand jury; that the jury commissioners had violated the law, or evaded the law, either directly or indirectly, by failing to summon for jury services citizens of the race and color of defendant, in violation of the Constitution and

the jury laws passed in pursuance thereto, and had made the discrimination to the prejudice of the defendant, as complained of in the challenge to the grand jury.

The court erred in assuming that the subpœna duces tecum, directed to the jury commissioners, was intended only as a means of eliciting information, and not for the purpose of obtaining books and papers which were particularly described therein, and not regarding its mission as a medium of legal evidence to obtain a list of the names and residence of the citizens qualified by them and placed in the jury wheel from which the venire was drawn and the grand jury which indicted the defendant was selected, a list of which they are compelled under the provisions of act No. 170 of the acts of 1894 to keep in their office.

The court erred in not passing on the misconduct of the jury as
120 alleged in the sworn motion for a new trial and the failure of the trial court to allow the defendant an opportunity to prove the allegations therein contained, as appertaining to the reasonable doubt, to which exception was reserved and a bill of exceptions filed thereto, and assigned as error in this court.

That the court erred in not decreeing that after the filing of the application for removal of cause in the trial court to the circuit court of the United States and the filing and docketing of the case in that tribunal under the provisions of section 641, Revised Statutes of U. S. and the subsequent order of the Federal court that all further proceedings thereafter, without any motion to remand, was coram non judice in the State court, and that the State court had no right thereafter to retain jurisdiction and proceed with the trial.

Wherefore, the premises considered, petitioner respectfully prays for a rehearing and for general and equitable relief, and all relief that this honorable court is competent to grant.

(Signed) THOS. F. MAHER,
Atty. for Defendant.

121 *Motion and order for delay to file briefs in support of application for rehearing.*

[Extract from minutes.]

NEW ORLEANS, *Saturday, June 8th, 1895.*

The court was duly open, pursuant to adjournment. Present, their honors Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, and Henry C. Miller, associate justices. Absent, Francis T. Nicholls, chief justice.

STATE OF LA.)
vs.) No. 11770.
JIM MURRAY, ALIAS GREASY JIM.)

On motion of Thos. F. Maher, esq., of counsel for defendant and appellant, it is ordered by the court that the appellant be allowed a delay of (3) days to prepare and file a brief in support of his petition for a rehearing in this case.

Rehearing refused.

[Extract from minutes.]

NEW ORLEANS, *June 17th, 1895.*

The court was duly open, pursuant to adjournment. Present, their honors Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, and Henry C. Miller, associate justices. Absent, Francis T. Nicholls.

STATE OF LA. *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

It is ordered that the rehearing applied for in this case be refused.

122 *Brief for rehearing. Filed June 8th, 1895.*

Supreme court, State of Louisiana.

STATE OF LA. *vs.* JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

123 [Supreme court of Louisiana. State vs. Jim Murray, alias Greasy Jim. No. 11770. Brief of defendant for rehearing.]

May it please the court: With a feeling of modesty that gnaws at my soul I again approach this honorable tribunal with a trepidity that may be classed perhaps as presumption, yet duty to my unfortunate client forces me to clash, with my limited ability, with the opinion of this court, for which I have the highest regard, in my efforts to protect the sacred rights of my client under the Constitution, and impelled as I am solely by the conviction, which is strongly fixed upon my mind, that the position assumed in the first hearing, as to some of the points at issue, is correct, I therefore enter upon the discussion with profound diffidence and utmost respect for the learned judge who as the organ of the court delivered the opinion. Pushed onward by a sense of duty to him I humbly represent, I am compelled to take issue with the court upon what I consider to be the salient and most important point affecting this case, and to differ from the court entirely in the views and construction placed thereon.

My first contention is that the grave and fundamental error is the refusal of the trial judge to order the issuance of the subpœna duces tecum after all prerequisites required by law had been complied with by the defendant, in order to have it go forth upon its judicial mission. The subpœna duces tecum is the attraction around with all other complaints of defendant revolve in ancillary orbits. How am I to construe due process of law and compulsory process? The court must stamp this process as being due process of law and compulsory process ex
124 necessitate, and the refusal of it by the court a quo, a deprivation of due process of law to the defendant. The jury commissioners were not witnesses for the defendant in this case, but had testified in

another case in Section A of the criminal district court. Their evidence in that case was offered by the State, and the defendant, for the purpose of contradicting them and their testimony, applied by motion for subpœna duces tecum. He swore that the evidence sought to be had was necessary and material in his defense, i. e., the list of the 1,000 names and residences of the citizens that they qualified and placed in the jury wheel, out of which the venire was drawn, from which the grand jury was selected that had indicted defendant.

Under act No. 170 of 1894 the list of the names and residences are part of the records of their office. Counsel for defendant earnestly contend that it was not for the purpose of eliciting information that he applied for the duces tecum, but to establish the allegations contained in the challenge to the grand jury. Your honors do not hold that he did not have, as a matter of legal right, by virtue of subpœna duces tecum, the only medium by which he could get the evidence sought to be had. This list is a public document under the control of the jury commissioners. Had the list been furnished the defendant would have had issued subpœna testificandum for the 1,000 citizens in the wheel, and the testimony would have shown positively that the discrimination complained of did exist as a matter of fact. Even admitting, for the sake of argument, that the object of the subpœna duces tecum was for the purpose of eliciting information, the trial court could not under the rule of procedure refuse the issuance of the duces tecum, as such a judicial act has no sanction. (Amer. & Eng. Ency. of Law, p'. 173 & 174, vol. 24.) The jury commissioners could have no lawful or reasonable excuse for withholding th' list.

Your honors have held correctly, but qualifiedly, that the proceedings were irregular. Due process of law and compulsory process, where life and liberty is the stake, is the law which is essential to the preservation of our social system and civilization, and rest upon the eternal and immutable principles of justice and human right.

The proceedings being irregular, I must invoke the doctrine of stare decisis, 30 A., p. 540, 2nd paragraph.

Defendant's fierce attack upon act 170 of 1894 as being unconstitutional, on the ground that it was a local and special law, with the absence of the constitutional prerequisites, counsel was conceited enough to conclude was unanswerable, but the master mind of this court on constitutional law met the attack with such an able and forceable opinion, he is frank to confess that his views on this point sustained a clear knock out.

Defendant respectfully contends that his pleadings under the provisions of section 641 of the Revised Statutes of the U. S. were in strict conformity with that statute, and has the approval of the United States Supreme Court. That court has authoritatively sanctioned this proceeding for removal of cause to the Federal court from a State court preceding trial. (Strauder vs. West Virginia, 100 U. S., 303.)

After the filing and docketing of a petition under section 641, R. S., U. S., in the circuit court the State court was ousted of its jurisdiction.

The refusal of the State court to allow the removal of cause to the Federal court cut no figure after the filing and docketing of the case in the Federal court and the order as was allowed by the judge thereof, as was done in this case.

The State court had no right thereafter to retain jurisdiction, after legal notification in the motion in arrest of judgment. (Northern Pacific R. Co. vs. McMullen, 56 N. W., 629; 68 Wis., 501.)

In the closing chapter of this case I implore of your honors to grant a rehearing, impressed as I am with the firm belief that the court a quo closed the doors of due process of law to my client and thereby deprived him of his constitutional rights guaranteed to him by the constitution of this State and the Constitution of the U. S., and his civil and equal rights thereunder.

Respectfully submitted.

THOS. F. MAHER,
Atty. for Defendant.

126 (Indorsed:) No. 11770. Supreme court of La. State of La. vs. Jim Murray, alias Greasy Jim. Brief for defendant for rehearing. Supreme court of Louisiana. Filed Jun. , 1895. T. McC. Hyman, clerk. Thos. F. Maher, atty. for defendant.

127 *Certificate of the clerk of the supreme court.*

UNITED STATES OF AMERICA.

State of Louisiana, Supreme court of State of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the foregoing 126 pages contain a true, full, and complete copy of the transcript of the proceedings had in the criminal district court for the parish of Orleans, State of Louisiana, in a certain suit wherein the State of Louisiana was plaintiff and Jim Murray, alias Greasy Jim, was defendant, and also of all the proceedings had in this the supreme court of the State of Louisiana on the appeal taken by the said defendant, which appeal is now on the files thereof under No. 11770.

In testimony whereof I have set my hand and affixed the seal of this court at the city of New Orleans this 12th day of August, anno Domini 1895, and in the 120 year of the Independence of the United States of America.

[SEAL.]

T. McC. HYMAN,
Clerk of Supreme Court of Louisiana.

128 *To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petition of James Murray, to whom the authorities of the State of Louisiana have added the alias of Jim Murray, alias Greasy Jim, a native-born citizen of the United States, of the African race and color, with respect represents:

That there is error to his prejudice in the opinion and decree of the honorable the supreme court of the State of Louisiana, a certified copy of which is hereto annexed and made part hereof for reference, in the affirmance of the verdict of the jury, and the judgment of Section B

of the criminal district court of the parish of Orleans, State of Louisiana, the trial court, which tried and sentenced him to death, in this, to wit:

That he was deprived of due process of law and compulsory process, provided for in his favor and guaranteed to him as a legal right under the constitution of the State of Louisiana and the Constitution of the United States, and his civil and equal rights thereunder, in this, to wit: By the refusal of the trial judge of the State court to grant to him the issuance of due process of law and compulsory process in the form of subpœna duces tecum upon the registrar of voters and jury commissioners, State officials of the State of Louisiana, to obtain evidence in his behalf and public records contained in their office, in order to establish the allegations in his challenge to the grand jury which indicted him and filed in the trial court, in which he alleged that the jury commissioners of the parish of Orleans, State of Louisiana, had violated the constitution of the State of Louisiana and the jury laws in conformity therewith, as well as the Constitution of the United States, and his civil and equal rights thereunder, and that the said grand jury was illegally selected, impanneled, and sworn in violation of the constitution of the State of Louisiana and the jury laws in conformity therewith, and the Constitu-
129 tion of the United States, and his civil and equal rights thereunder, by the jury commissioners in discriminating against and failing to summon before them persons of his race and color, although possessed of all other qualifications requisite under the laws of the State of Louisiana and the United States to serve as grand and petit jurors.

Petitioner avers that to the refusal of the trial court of the State to grant him due process of law and compulsory process, bills of exceptions were reserved and filed in *in* the trial court of the State, and the aid and protection of the constitution of the State of Louisiana and the Constitution of the United States, and his civil and equal rights thereunder invoked, and a Federal question set up in the trial court of the State of Louisiana in this, to wit, depriving him, a citizen of the United States, of due process of law and compulsory process in his favor, a right guaranteed to him by the Constitution of the United States, and his civil and equal rights thereunder, and passed upon by the honorable the supreme court of the State of Louisiana, on appeal and by application for rehearing, and decided adversely to his said rights under the Constitution of the United States.

Your petitioner avers that he filed a petition for removal of cause in the trial court of the State of Louisiana, before trial and conviction, to the circuit court of the United States for the circuit and district of Louisiana, in conformity with section 641 of the Revised Statutes of the United States; in substance he alleged that he was a citizen of the United States, of the African race and color, in custody of the State authorities; that the indict*ed* under which he is held as presented by the grand jury, qualified during the month of September, 1894, under act No. 170, of 1894, by the jury commissioners, who violated the 14th amendment to the Constitution of the United States, by failing to summon before them for qualification citizens of his race and color, in compliance with
130 the constitution of the State of Louisiana, and the jury laws in conformity therewith, and by their illegal action and conduct have excluded from jury service citizens of his race and color, although they

are possessed of all other qualifications requisite under the constitution of the State of Louisiana and the law thereof, as well as the Constitution of the United States, to serve as grand jurors.

That the jury commissioners illegally confined their summon to white citizens only, and that there is no criminal statute of the State of Louisiana to punish them for this illegal discrimination on account of race, color, etc.

That his rights secured to him by the constitution of the State of Louisiana, and the laws providing for the equal rights of all citizens of the United States, was denied to him in the State court, the trial court, in this, to wit:

That on the 10th day of January, 1895, he filed in the trial court of the State of Louisiana a challenge to the grand jury which indicted him, and it was ordered filed by the said court subject to argument on face of papers, etc., and accompanying it a motion for subpœna duces tecum on the registrar of voters and jury commissioners, officials of the parish of Orleans, State of Louisiana, to furnish evidence in their possession as public officers, public documents in their office, to support as proof the challenge to the grand jury, which he swore was necessary and material for his defense, and his said motions were refused by the trial judge of the State court. That the refusal of the trial court of the State to order the issuance of the subpœna duces tecum, was a judicial act, depriving him of due process of law, and compulsory process in his favor, in violation of articles 6 and 8 of constitution of the State of Louisiana and the 14th amendment, to the Constitution of the United States; that the man he is charged with having murdered was a white man; that the local prejudice is of such a strong character against his obtaining a fair and impartial trial (independent of the merits of the case, based
131 upon the fact that he is a colored man and the man he is accused of having murdered a white man) in the trial court or any court of the State to which the case could be removed by this state of facts: newspaper publications in the Times-Democrat, and the Daily Item, (two of the leading journals in the city of New Orleans, with a large circulation and powerful influence on the minds of their readers), and the articles published of such a hostile and imflammatory character as to cause the prejudging of his case before trial; that he could not have the equal benefit of all the laws, and all of his rights in this prosecution, as is enjoyed by white citizens, and that he has less chance of enforcing in this court or the courts of the State of Louisiana, all of his rights in this prosecution as a citizen of the United States, and there is a probability of a denial to him of his said rights in every trial which may take place upon this indictment; and he prayed for a removal of the cause to the circuit court of the United States for the circuit and district of Louisiana, in conformity with section 641 of the Revised Statutes of the United States; and that he swore in an affidavit that the facts contained in the foregoing petition were true and correct, and he was prepared to establish the allegations contained therein by competent evidence; that after the filing of the petition it was overruled; the filing and overruling by the trial court was one and the same act, and he was not permitted to summon any witnesses to prove the allegations contained in the said petition. That the refusal of the trial court of the State of Louisiana to

allow him an opportunity to summon any witnesses and have his application for removal of cause to the Federal court tried and heard in conformity with section 641 of the Revised Statutes of the United States was the judicial act of the trial judge of the State court of the State of Louisiana, done in his official capacity and as agent of the State of Louisiana, and it was therefore the act of the State of Louisiana itself, denying to him his constitutional rights of due process of law and
132 the equal protection of the law, to which bills of exceptions were reserved and filed and the aid and protection of the constitution of the State of Louisiana and the Constitution of the United States and his civil and equal rights thereunder invoked, and the application, construction, and interpretation of section 641 of the Revised Statute' of the United States, and a Federal question set up in the trial court of the State denying to him the right of due process of law and the equal benefit of the law as guaranteed to him by the Constitution and laws of the United States and passed upon by the honorable the supreme court of the State of Louisiana, on appeal and by application for rehearing, and decided adversely to his rights under the Constitution of the United States.

Your petitioner avers before his trial and conviction in the trial court of the State of Louisiana he presented, had filed, and docketed in the circuit court of the United States for the circuit and district of Louisiana a petition in which he alleged that he was a citizen of the United States, and reiterated his allegations in the petition filed in the trial court of the State for removal of cause, and additionally alleging that the action of the trial judge of the State court in refusing him due process of law was depriving him of his rights under the Constitution and laws of the United States, and the act of the trial judge of the State court, as agent of the State of Louisiana, was the act of the State of Louisiana itself. That the aforesaid petition was ordered filed and docketed by the Federal judge, in conformity with section 641 of the Revised Statutes of the United States, and the application, construction, and interpretation of this statute of the United States, and his legal rights thereunder, set up in the trial court and passed upon by the honorable the supreme court of the States of Louisiana, on appeal and by application for rehearing, and decided adversely to his rights under the Constitution of the United States.

133 Your petitioner avers that notwithstanding the filing and docketing of his case in the circuit court of the United States for the circuit and district of Louisiana, he was tried and convicted in the trial court of the State of Louisiana, and that he filed a motion for a new trial, alleging that by misconduct of the jury which found him guilty that he was not given the benefit of the reasonable doubt, etc., and that his motion for a new trial was overruled by the trial court of the State without giving him an opportunity to summon any witnesses to prove the allegations therein contained. To which ruling of the trial court bills of exceptions were reserved and filed, and the aid and protection of the constitution of the State of Louisiana and the Constitution of the United States and his civil and equal rights thereunder and his rights as a citizen of the United States to due process of law and compulsory process invoked, and this right set up as a Federal question in the trial court of

the State and passed upon by the honorable the supreme court of the State of Louisiana on appeal and by application for rehearing, and decide' adversely to his rights under the Constitution of the United States.

Your petitioner avers that after the trial court of the State of Louisiana had overruled his motion for a new trial he filed a motion in arrest of judgment, to which he annexed a certified copy of the petition filed and docketed in the circuit court of the United States for the circuit and district of Louisiana, in conformity with section 641 of the Revised Statutes of the United States, with the order of the Federal judge thereon, and suggested in his said motion that there purported to be a clash of jurisdiction between the State and Federal tribunals; that the trial judge of the State court immediately overruled the motion in arrest of judgment and pronounced sentence upon him, to which action and ruling of the trial judge bills of exceptions were reserved and filed and the protection and aid of the constitution of the State of Louisiana and the Constitution of the United States and his civil and equal
134 rights thereunder invoked, and a Federal question set up in the trial court of the State as to the application, construction, and interpretation of section 641 of the Revised Statutes of the United States, and passed upon by the honorable the supreme court of Louisiana on appeal and by application for rehearing and decided adversely to his rights under the Constitution and laws of the United States.

Your petitioner avers that the opinion, decree, and judgment of the honorable the supreme court of the State of Louisiana wherein the application, construction, and interpretation of section 641 of the Revised Statutes of the United States as set up in the trial court of the State and passed upon by the honorable the supreme court of the State of Louisiana on appeal and by application for rehearing, relegates him to this honorable court as the only court having jurisdiction and competency to finally pass on this Federal question as to the application, construction, and interpretaton of section 641 of the Revised Statutes of the United States, and his civil and equal rights thereunder.

Your petitioner avers that after the honorable the supreme court of the State of Louisiana had passed finally on his case, by refusing a rehearing, on the 17th day of June, 1895, that on the 18th day of June, 1895, he presented and applied by petition (which said petition is hereto annexed and made part hereof for reference) to that honorable court to grant him a writ of error to this honorable court; that the supreme court of the State of Louisiana refused to grant him the relief prayed for in the premises, and to which he had a right as a citizen of the United States under the Constitution and laws of the United States.

Your petitioner avers that in order to obtain full and complete justice and to secure and insure and protect his rights as a citizen of the United States his remedy under the laws of the United States is by writ of error to this honorable court.

135 Wherefore, the premises and affidavit being considered, your petitioner respectfully prays that this honorable court grant to him a writ of error, directed to the honorable the supreme court of the State of Louisiana, to operate as a supersedeas and stay all further proceedings and the execution of the judgment of the trial court, Section B of the criminal district court of the parish of Orleans, State of Louisiana,

as affirmed by the supreme court of Louisiana, until this honorable court shall pass upon this case, in due course of law, and upon the record and proceedings therein, and upon his constitutional rights and his civil and equal rights guaranteed to him by the Constitution and laws of the United States, as set up by him in the trial court of the State of Louisiana and passed upon by the honorable the supreme court of the State of Louisiana on appeal and by application for rehearing, and decided adversely to his legal rights as a citizen of the United States under the Constitution and laws of the United , and for all orders that this honorable court is competent to grant and for general and equitable relief, and for all other relief that the Constitution and laws of the United States can grant him.

THOS. F. MAHER,
Atty. for Petitioner.

James Murray, who, being duly sworn, doth depose and say: That the allegations contained in the foregoing petition are true and correct, and that in order to obtain full and complete justice, and to insure and protect his rights as a citizen of the United States, that his only in the premises is by writ of error, directed by this honorable court to the supreme court of Louisiana, and that he is a native-born citizen of the United States, of the African race and color, and a citizen of the United States, and his poverty is such that he can not pay any costs or furnish security, and that he has a right under the acts of Congress to prosecute his case in forma pauperis.

JAMES MURRY.

Sworn to and subscribed before me this 20th day of June, 1895.

[SEAL.] CHAS. J. REILLY,
Deputy Clerk Criminal Dist. Court, Parish of Orleans.

136 United States of America, State of Louisiana, supreme court of the State of Louisiana.

NEW ORLEANS, *Monday, June 3rd, 1895.*

The court was duly opened, pursuant to adjournment. Present, their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, Henry C. Miller, associate justices.

His honor Mr. Justice Watkins pronounced the opinion and judgment of the court in the following case:

137 MONDAY, *June 3rd, 1895.*

STATE OF LOUISIANA
vs.
JIM MURRAY, ALIAS GREASY JIM. } No. 11770.

Appeal from the criminal district court, parish of Orleans.

Mr. Justice WATKINS:

Having been convicted of murder and sentenced to the extreme penalty of the law, the defendant has appealed, relying upon a variety of

technical pleas, though chiefly upon the complaint that he is a colored man and that the deceased was a white man, and in the selection and drawing of the grand jury there was an unlawful discrimination against the black or colored race in favor of the white or Caucasian race, whereby he sustained an unjust deprivation of his legal rights.

First in order is defendant's bill of exceptions to the overruling of his challenge to the array. Substantially it is, that in selecting the persons whose names were placed in the jury wheel, from which the grand jurors who found the bill, and the petit jurors who tried and convicted him, were drawn, the jury commissioners violated the provisions of various State and Federal statutes, as well various provisions of the State and Federal constitutions, in that they discriminated against citizens of the black or colored race, so that he was deprived of an equal protection of the law during the progress of the trial.

That, consequently, the indictment against him was null and void.

138 Simplified, the complaint is that citizens of African descent were excluded from the jury wheel, and consequently from participating in the trial, from the commencement to the end.

This, of course, depended upon the proof, of which the defendant carried the burden.

The evidence fails to support the challenge.

Each of the jury commissioners were called as witnesses for the purpose of substantiating the charge, but their evidence completely overthrows it. The trend of their testimony is that they had acted with perfect fairness and impartiality in the discharge of all their duties as jury commissioners, and in strict conformity to law.

That there were quite a number of names of colored men in the jury wheel at the time the venire was drawn, and that there were at least two colored men on the panel from which the grand jury who found the indictment against the defendant were chosen.

That they have never, in the performance of their duties, made any discriminations on account of race, color, or previous condition of servitude.

Defendant's counsel also called and interrogated as witnesses quite a number of deputy sheriffs, who served summonses on the persons whom the jury commissioners desired to examine preparatory to jury service.

The purport of their evidence is that a large preponderance of them were constructively notified by making domiciliary service, and being unacquainted with them personally they could not state whether they were colored or white persons.

The evidence shows that there were some persons of color who were members of the grand jury who found the bill, and it is there-

139 fore quite clear that the general venire was not exclusively composed of white persons, and it is thus made clear that colored citizens were not excluded from the venire on account of race or color.

The trial judge cited and relied upon State vs. Joseph, 35 A., 905. It is quite a similar case, and the same issue was therein raised and decided.

Admitting the premises arguendo, the court say:

"It is quite true that all the names which were drawn from the box were those of white people, yet it is not established by any testimony in the record that all the three hundred names in the general venire box

were those of white people. This is destructive of defendant's theory, because he had the chance of some colored persons being drawn from the box, unless it was exclusively made up of the names of white persons. And, in addition to this argument, is the fact sworn to by one of the jury commissioners that people of African descent were not excluded from the venire box on account of their race or color."

There is no question in our minds of the correctness of the trial judge's ruling.

With regard to the defendant's complaint as to the action of the court with reference to his motions for subpœnas duces tecum on the registrar of voters and the jury commissioners nothing need be said, because they cut no figure in the case, since the testimony which was elicited from the witnesses clearly show that his challenge to the array was groundless. As these subpœnas could not have practically affected the result in the face of the positive testimony adduced on the trial of the motion, it might be conceded for the argument that the proceedings under them were irregular, though such is not the case by any means, as the subpœna directed to the jury commissioners shows that it was intended
140 only as a means of eliciting information, and not for the purpose of obtaining books and papers which were particularly described therein.

Defendant's counsel retained a bill to the judge's refusal to quash the indictment on the ground that act No. 170 of 1894, under the provisions of which the grand jury was drawn, is unconstitutional, null, and void, it being a local or special law, and not enacted according to constitutional requirement by giving previous public notice.

The act drawn in question purports to be an amendment and reenactment of section 2 of act 98 of 1880, to organize the criminal district court of the parish of Orleans in pursuance of article 130 of the constitution of the State, to create a board of jury commissioners, and for other purposes.

Immediately after the title of this amendatory act comes this prefatory clause, viz:

"Whereas due proof has been made that notice of intention to apply for the passage of this act has been published in accordance with the provisions of article 48 of the State constitution," &c.

The provisions of article 48 of the constitution are as follows, viz:

"No local or special laws shall be passed on any subject not enumerated in article 46 of the constitution, unless notice of the intention to apply therefor shall have been published, without cost to the State, in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the general assembly of such bill, and in the same manner provided by law
141 for the advertisement of judicial sales.

"The evidence of such notice having been published shall be exhibited in the general assembly before such act shall be passed, and every such act shall contain a recital that such notice has been given."

This amendatory statute appears to strictly conform to the foregoing constitutional requirement in every particular, and its recitals must be accepted as the final and conclusive proof of such notice of intention

having been given, and that such proof was "exhibited in the general assembly" before the passage thereof, there being no charge of fraud or ill practice in procuring its enactment.

No extrinsic proof is admissible for the purpose of contradicting the recitals contained in a legislative act. (State ex rel. Morris vs. Mason, 43 A., 590).

But we think it evident that the amendment must follow the conditions of the statute that is thereby amended, and it was held and interpreted by this court not to be a local or special law. (State vs. Dalon, 35 A., 1141.)

In treating the question here raised the court there said:

"It has no private or local good in view, but aims solely at the enforcement of the laws enacted for the prevention and punishment of crime. It is a public, a general act, which regulates the common good of each and every member of the human family within the limits of the State.

"The words 'local' or 'special' are clearly used in contradistinction of the word 'general.'

* * * * * * *

"A moment's reflection satisfies the mind that the intention to
142 apply, alluded to, can only mean that of private individuals seeking some private advantage or advancement for the benefit of private persons or property within a certain locality.

"It is manifest that the act assailed was one of indispensable necessity to put in motion a court created by the constitution, and which, without such legislation, would have remained lifeless and cumbersome."

We can but regard that reasoning sound and the authority of that decision complete.

On neither proposition can defendant's complaint be sustained. The judge below correctly declined to sustain the alleged unconstitutionality of the law, and properly maintained the indictment.

Immediately after the defendant's motion to quash was overruled his counsel filed a motion to transfer the cause to the circuit court of the United States which is exclusively based upon the grounds assigned in the challenge to the array of grand jurors and other rulings of the *of the* court previously discussed.

This motion was at once overruled and the transfer of the cause refused.

This refusal was a matter of course, in view of the previous rulings of the court below, which we have found correct and approved.

Had we, on the other hand, ascertained the fact to be that the jury commissioners were guilty of illegal discrimination against citizens of African descent within the sense of the Federal statutes and Constitution, our ruling would have been different and the motion to transfer unnecessary.

After the trial was completed a motion for a new trial is made substantially upon the same grounds as those already gone over, coupled with a criticism of the written charge of the court to the jury.

143 Of course the correctness of the rulings of the trial judge on the propositions enumerated necessarily draws to it the correctness of the judge's declination to grant a new trial predicated on the theory that his rulings were erroneous; and we have uniformly held that unless exception has been first taken to the charge of the court objections urged for the first time in a motion for a new trial will be of no avail.

At this juncture in the proceedings counsel for the defendant tendered a motion in arrest of judgment, based on the ground that he having filed a motion to transfer this cause into the circuit court of the United States under and by virtue of section 641 of the Revised Statutes of the United States, and having subsequently filed and docketed said petition in said circuit court conformably to law, this court is not possessed of jurisdiction or authority any further to proceed in the cause; and thereupon defendant's prayer is that the judgment of the court a qua be arrested, that the trial and verdict be declared a nullity, and that he be surrendered to the circuit court in order that the cause be therein proceeded with according to law.

The question here presented, so far as the jurisdiction and authority of the court a qua is concerned, goes back to the challenge to the array again. If the challenge was causeless all subsequent proceedings were necessarily legal and jurisdictional—ultimately subject to such decision as the Federal tribunals may make in the premises.

We must deal with the issues presented, and, in our view, there is nothing in them to justify the conclusion that the court a qua did not have full and complete jurisdiction. The motion in arrest was correctly refused.

Having examined this case with the care required in a case
144 involving the life of a human being, we have reached the conclusion that there is no error in any of the rulings defendant has complained of; but we can not refrain from applauding the zeal and vigor with which counsel for the defendant has defended the accused. Judgment affirmed.

Rehearing refused June 17, 1895.

The judgment having become final, the foregoing is a true copy of the opinion and judgment rendered in the case of State of Louisiana vs. Jim Murray, alias Greasy Jim, No. 11770.

Clerk's office, New Orleans, La., June 18th, 1895.

[SEAL.] T. McC. HYMAN, *Clerk.*

SYLLABUS.

(1) Notwithstanding all the names which are drawn from the jury wheel were those of white persons, if proof be not administered that all the names therein were of white people, the theory of the defendant, a colored person, that discrimination against his race was resorted to on account of race, color, or previous condition of servitude, can not be of avail. And proof being made of the fact that persons of African descent were not excluded from the general venire, but, on the contrary, that some colored people were included therein, the charge that the accused has been deprived of due protection of the law is unfounded.

(2) Act 170 of 1884, being an amendment of section 2 of act 98 of 1880, is not a local or special law in the sense of article 48 of the constitution, the constitutionality of the original act having been affirmed by this court.

145 (3) Other bills of exception taken to rulings of the trial judge, already affirmed and approved, need not be again analyzed.

(4) That a motion to transfer a cause to the circuit court of the United States has been made and overruled does not divest the court of first instance of jurisdiction, nor can a petition to same effect, subsequently filed in the circuit court of the United States, have that effect.

146 (Indorsed:) No. 11770. Supreme court of the State of Louisiana. State of Louisiana vs. Jim Murray, alias Greasy Jim. Appeal from the criminal district court for the parish of Orleans. No. . Certified copy of opinion and judgment.

147 *To the Honorable the Supreme Court of the State of Louisiana:*

The petition of James Murray, alias Greasy Jim, a citizen of the United States, of the African race and color, with respect represent': That there is error to his prejudice in the opinion and decree of this honorable court, in the affirmance of the verdict of the jury and the judgment of the trial court, section B of criminal district court of the parish of Orleans, sentencing him to death, in this, to wit: That he was deprived of due process of law, and compulsory process provided for in his favor and guaranteed to him as a legal right under the constitution of this State and the Constitution of the United States, and his civil and equal rights thereunder, in this: By the refusal of the trial judge to grant to him the issuance of due process of law and compulsory process in the form of a subpœna duces tecum, upon the registrar of voters and jury commissioners, State officials of the parish of Orleans, to obtain evidence in his behalf, and public records contained in their office, to establish the allegations contained in his challenge to the grand jury which indicted him, that the jury commissioners of the parish of Orleans had violated the constitution of this State and the jury laws in conformity therewith, as well as a statute of the United States, entitled an act to protect all citizens in their civil and legal rights in conformity to the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder, which enacts that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified from service as grand and petit jurors in any court of the United States, or any State, on account of race, color, or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning, who shall violate*d* this statute by failing to summons any citizen for the causes aforesaid shall, on conviction thereof, be fined not more than $5,000. Approved March 1st, 1875.

148 That petitioner alleged in his challenge to the grand jury that the jury commissioners had violated the constitution of this State and the jury laws passed in conformity therewith, as well as the Constitution and laws of the United States, and his civil and equal rights thereunder.

Petitioner alleges had the trial court allowed him the rights of due process of law, and compulsory process, he could have established the allegations contained in his challenge to the grand jury, and have quashed the indictment found against him by the said grand jury, which was illegally selected, impan*n*eled, and sworn in violation of the constitution of this State and the jury laws thereof, and the Constitution of the United States, and his civil and equal rights thereunder, by discrimination, and

failing to summons before them persons of his race and color, although possessed of all the other qualification' requisite under the laws of this State and the United States, to serve as grand and petit jurors.

Petitioner alleges that the refusal of the trial court to grant him due process of law and compulsory process, bills of exception were taken and filed, and the aid and protection of the constitution of this State and the Constitution of the United States, and his civil and equal rights thereunder invoked, and a Federal question set up in the trial court and passed upon by this honorable court.

That your petitioner filed a petition for removal of cause in the State court to the circuit court of the United States for the circuit and district of Louisiana. In substance he alleged that he was a citizen of the United States of the African race and color, in custody of the State authorities, that the indictment under which he is held as presented by the grand jury, qualified during the month of September, 1894, under act No. 170, of 1894, by the jury commissioners who violated the 14th amendment to the Constitution of the U. S. by failing to summon before them for qualification citizens of his race and color in compliance with the constitution of this State and the jury laws in conformity therewith, and by their illegal action and conduct have excluded from jury service
149 citizens of his race and color, although they are possessed of all other qualifications requisite under the constitution of this State and the laws thereof, as well as the Constitution of the United States, to serve as grand jurors.

That act No. 170 of 1894 is unconstitutional in this: In omitting the compliance clause to the 14th amendment to the Constitution of the United States.

That the jury commissioners illegally confined their summon to white citizens only, and there is no criminal statute of this State to coerce or punish them for this illegal discrimination on account of race, color, etc.

That his rights secured to him by the constitution of this State and the laws providing for the equal rights of all citizens of the United States was denied to him in this court.

That on the 10th day of January, 1895, he filed a challenge to the grand jury which indicted him and it was ordered filed by the court subject to argument on the face of the papers, etc., and accompanying it a motion for subpœna duces tecum on the registrar of voters and jury commissioners of this parish to furnish evidence in their possession, as public officers, to support as proof the challenge to the grand jury, which he swore was necessary to his defence, and refused by the court. That the refusal of the court to order a subpœna duces tecum was a judicial act, depriving him of due process of law and compulsory process in his favor, in violation of articles 6 and 8 of the constitution of this State and the 14th amendment to the Constitution of the United States. That the man he is charged with having murdered was a white man, that the local prejudice is of such a strong character against his obtaining a fair and impartial trial (independent of the merits of the case, based upon the fact that he is a colored man, and the man who he is accused of having murdered a white man) in this court or any other court in this State to which the case could be removed, by this state of facts, newspaper pub-

lications in the Times-Democrat and Daily Item (two of the leading
150 journals published in this city), with a large circulation and powerful influence on the minds of their readers, and the articles published of such a hostile and inflammatory character as to cause the prejudging of his case before trial. That he can not have the equal benefit of all the laws, and all his rights in this prosecution, as is enjoyed by white citizens, and that he has less chance of enforcing in this court or the courts of this State all of his rights in this prosecution as a citizen of the United States, and there is a probability of a denial to him of his said rights in every trial which may take place upon this indictment in the courts of this parish, and prays for a removal of the cause to the circuit court of the United States for the circuit and district of Louisiana, in conformity with section 641 of the Revised Statutes of the United States.

Petitioner avers that he swore to an affidavit that the facts contained in the foregoing petition were true and correct, and was prepared to establish the allegations contained therein by competent evidence; that after the filing of the petition it was overruled, the filing and overruling was one and the same act, and he was not permitted to summon any witnesses to prove the allegations contained in the said petition.

Petitioner alleges that the refusal of the trial court to allow him an opportunity to summon witnesses and have his application for removal of cause tried and heard, as in conformity with section 641 of R. S. of U. S., was a judicial act of the trial judge, done in his official capacity as an agent of the State, and clothed with the power of the State; that it was therefore the act of the State itself denying to him his constitutional rights of due process of law, and the equal protection of the law. To which bills of exceptions were reserved and filed, and the aid and protection of the constitution of the State and the Constitution of the United States, and his civil and equal rights thereunder, invoked, and the application, interpretation, and construction of section 641, R. S. of United States, and a Federal question set up in the trial court and passed upon by this court, on appeal and by an application for rehearing.

151 Your petitioner avers that before trial and conviction in the State court he presented and had filed and docketed in the circuit court of the United States for the circuit and district of Louisiana a petition in which he alleged that he was a citizen of the United States, and reiterated the allegations in the petition for removal of cause to the Federal court, and additionally alleging that the action of the trial judge in refusing him due process of law was depriving him of his rights under the Constitution and laws of the United States, and that the act of the trial judge as agent of the State of Louisiana was the act of the State itself.

Your petitioner avers that the aforesaid petition was ordered filed and docketed by the Federal judge in conformity with section 641 of the Revised Statutes of the United States, and the application, interpretation, and construction of this statute of the United States, and his constitutional rights thereunder, was set up in the trial court and passed upon by this honorable court on appeal and by application for a rehearing.

Your petitioner avers that, notwithstanding the filing and docketing of his case in the circuit court of the United States for the circuit and dis-

trict of Louisiana, he was tried and convicted in the trial court, and that he filed a motion for a new trial, alleging that by misconduct of the jury which found him guilty that he was not given the benefit of the reasonable doubt, etc., and his motion for a new trial was overruled without giving him an opportunity to summon any witnesses to prove the allegations therein contained. To which ruling bills of exceptions were reserved and filed, and the aid of and protection of the constitution of the State and the Constitution of the United States, and his civil and equal rights thereunder, and his right to due process of law and compulsory process, invoked, and a Federal question set up in the trial court and passed upon by this honorable court on appeal and by an application for a rehearing.

152 Your petitioner avers that after the trial court had overruled his motion for a new trial, on the same day he filed a motion in arrest of judgment, to which he annexed a certified copy of his petition filed and docketed in the circuit court of the United States for the circuit and district of Louisiana, in conformity with section 641 of the Revised Statutes of the United States, with the order of the Federal judge thereon, and suggested therein that there purported to be a clash of jurisdiction between the State and Federal tribunals; that the trial court immediately overruled the motion in arrest of judgment and pronounced sentence upon him. To which action and ruling of the trial court bills of exceptions were reserved and filed, and the aid and protection of the constitution of the State and the Constitution of the United States, and his civil and equal rights thereunder, invoked, and a Federal question set up in the trial court and passed upon by this honorable court on appeal and by application for a rehearing.

Your petitioner avers that the decree of this honorable court wherein the application, construction, and interpretation of section 641 of the Revised Statutes of the United States, as set up in the trial court and passed upon by this court on appeal and by application for a rehearing, relegates him to the honorable the Supreme Court of the United States as the only court having jurisdiction of this Federal question, as to the application, construction, and interpretation of section 641 of the Revised Statutes of the United States, and his civil and equal rights thereunder.

Your petitioner avers that in order to obtain full and complete justice and to insure and protect his rights under the Constitution of the United States and the laws thereof, that his only remedy is by writ of error to the honorable the Supreme Court of the United States.

Wherefore the premises and the annexed affidavit being considered, your petitioner respectfully prays that he be granted a writ of error from this honorable court to the Supreme Court of the United States

153 of America, to operate as a supersedeas and stay the proceedings and execution of the judgment of the trial court, section B, criminal district court of the parish of Orleans, State of Louisiana, as affirmed by this court, until that honorable shall pass finally upon this case, and the record and all the proceedings therein, and upon his constitutional rights, and his civil and equal rights guaranteed to him by the Constitution and laws of the United States, as set up by him in the trial court and passed upon by this honorable court on appeal and application for rehearing, and decided adversely to his legal rights under the Constitu-

tion and laws of the United States, and for such other orders as this honorable court is competent to grant, and for general and equitable relief, and for all other relief that the Constitution and laws of the United States can grant him in the premises.

THOS. F. MAHER,
Atty. for Petitioner.

James Murray, being duly sworn, doth depose and say: That the allegations contained in the foregoing petition are true and correct, and that in order to obtain full and complete justice and insure and protect his rights as a citizen of the United States under the Constitution and laws of the United States, that his only remedy in the premises is by writ of error to the honorable *to* the Supreme Court of the United States; that under the laws of the State of Louisiana he is dispensed with paying any advanced costs in this criminal prosecution brought against him by the State, and that he is a native-born citizen, of the African race and color, and a citizen of United States, and that his poverty is such that he can not pay any costs or furnish security, and that he has a right under the acts of Congress of the United States to prosecute his case in forma pauperis.

JAMES MURRAY.

Sworn to and subscribed before me this 18th day of June, 1895.

[SEAL.] CHAS. J. REILLY,
Deputy Clerk Criminal Dist. Ct. Parish of Orleans.

154 In our opinion there was no denial of any right to the prisoner, and it would be manifestly inconsist' with the views expressed by this court to grant the writ. It is therefore denied.

Done and signed officially at chambers, New Orleans, La., June 19th, 1895.

L. B. WATKINS,
Presiding Justice.

(Indorsed:) No. 11770. Supreme court of the State of Louisiana. State of La. vs. Jim Murray, alias Greasy Jim. Petition for writ of error to United States Supreme Court. Thos. F. Maher, atty. for plaintiff in error. Presented June 18, 1895.

155 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said record and proceedings on appeal and application for rehearing before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Louisiana and James Murray, alias Greasy Jim, a citizen of the United States, wherein was drawn in question in the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a
156 treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James Murray, alias Greasy Jim, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the day of , in the year of our Lord one thousand eight hundred and eighty- .

Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by

157 (Indorsed:) No. 11770. State of La. versus Jim Murray, alias Greasy Jim. Writ of error. Copy of a writ of error lodged in the clerk's office of the . Copy in pursuance of the statute in such cases made and provided this day of , one thousand eight hundred and eighty- . , attorney of plaintiff in error.

158 Upon examining this petition and the transcript of the record of the within case as presented to the supreme court of Louisiana, I am of opinion that the accused, the petitioner, specially set up and claimed rights and privileges under the Constitution and laws of the United States were denied to him by the judgment of that court, and consequently he is entitled under the laws of the United States to have that judgment reexamined in the Supreme Court of the United States. The writ of error prayed for is, therefore, allowed. This July 19th, 1895.

JOHN M. HARLAN,
Asso. Justice Supreme Court of the United States.

(Indorsed:) No. 11770. United States Supreme Court. In the matter of James Murray, praying for writ of error. Supreme court of La. Filed 1st August, 1895. T. McC. Hyman, clerk. Thos. F. Maher, atty. for plft. in error.

159 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or

some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Murray, alias Greasy Jim, appellant, and the State of Louisiana, appellee, No. 11770, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
160 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

161 (Indorsed:) No. 11770. Supreme court of the State of Louisiana. James Murray, plaintiff in error, *v.* State of Louisiana, defendant in error. Writ of error. Filed 6 August, 1895. T. McC. Hyman, clerk.

162 UNITED STATES OF AMERICA, ss.

To the State of Louisiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Louisiana, wherein James Murray, alias Greasy Jim, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plain-

tiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 26th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

163 On this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Leon B. Duncan before me, the subscriber, he being a deputy U. S. marshal for the eastern district of Louisiana, in which dist. is located the capitol of the State of Louisiana, and makes oath that he delivered a true copy of the within citation to the State of Louisiana by handing same to his excellency Murphy J. Foster, governor of said State, in person, at Baton Rouge, La., on the 9th day of August, 1895.

L. B. DUNCAN,
Deputy U. S. Marshal.

Sworn to and subscribed the 9th day of Aug., A. D. 1895.

[SEAL.] J. T. YOUNG,
D'y Clerk U. S. C. Court.

164 Supreme Court of the United States.

STATE OF LOUISIANA, DEFENDANT IN ERROR,
vs.
JAMES MURRAY, ALIAS GREASY JIM, PLAINTIFF IN error. } No. 718.

Now into this honorable court comes the accused and plaintiff in error and assigns the following errors committed to his prejudice during the trial of his case in the trial court of the State of Louisiana, which said errors were passed upon and affirmed by the supreme court of the State of Louisiana:

First. Endorsement of the trial court on the challenge to the grand jury, "filed subject to argument on face of papers, etc." This endorsement change, the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent, contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the constitution of Louisiana and the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder. And to this decision and ruling of the trial court of the State of Louisiana, as affirmed by the supreme court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Second. Endorsement of trial court of the State of Louisiana on motion for subpœna duces tecum on F. C. Zacherie, registrar of voters, "filed subject to orders." The allegations in said subpœna duces tecum alleged that certain evidence was material to support the challenge to the grand jury. Said endorsement changes the form of criminal procedure and the

forms of law, thereby depriving the accused of due process of law, in violation of the constitutional rights of the accused guaranteed to him
165 by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court of the State of Louisiana, as affirmed by the supreme court of Louisiana, the accused and plaintiff in error assigns as error.

Third. Endorsement of trial court of State of Louisiana, on motion for subpœna duces tecum on jury commissioners, endorsed, "filed subject to orders." This judicial action of the trial court of the State of Louisiana, change' the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal to the supreme court of the State of Louisiana, the accused and plaintiff in error assign' as error.

Fourth. Extract from the minutes of the trial court of the State of Louisiana of date February 5th, 1895, on resumption of argument to challenge to grand jury, in which the trial court ruled that counsel for accused must produce proof, without expecting to produce same through the court. This judicial action or ruling of the trial court of the State of Louisiana change' the form of criminal procedure, thereby depriving the accused of due process of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and
166 equal rights thereunder, and to this decision and ruling of trial court of the State of Louisiana, as affirmed on appeal by the supreme court of Louisiana, the accused and plaintiff in error assigns as error.

Fifth. Compelling accused by judicial coertion of trial court, to swear to an affidavit as to the necessity and materiality, for a subpœna duces tecum on Francis C. Zacherie registrar of voters of the parish of Orleans, and the jury commissioners of the parish of Orleans, to furnish evidence in their possession in support of the allegations contained in the challenge to the grand jury. This decision or ruling of the trial court of the State of Louisiana change the form of criminal procedure, thereby depriving the accused of the benefit of due process of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th admendment to the Constitution of the United States, and his civil and equal rights thereunder. To this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the supreme court of Louisiana, the accused and plaintiff in error assigns as error.

Sixth. Overruling by trial court of the State of Louisiana of motion to quash indictment on the grounds of the unconstitutionality of act No. 170 of the acts of the legislature of the State of Louisiana of the year of 1894, to the injury and prejudice of the accused, in violation of law and

the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the supreme court of the State of Louisiana, the accused and plaintiff in error assigns as error.

167 Seventh. Overruling by trial court of the State of Louisiana, without giving the accused an opportunity to summon witnesses, and the hearing of the law and the evidence on the application of the petition for removal of cause to the circuit court of the United States for the circuit and district of Louisiana, thereby depriving the accused of the benefit of due process of law, and ignoring the provisions of section 641 of the Revised Statutes of the United States, with the judicial purpose of treating with defiance and contempt the Federal law on this subject and a denial of justice and arbitrary ruling in violation of the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal to the supreme court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Eighth. Proceeding with the trial of the accused by the trial court of the State of Louisiana, after notification by letter from counsel of the accused of date February 22nd, 1895, in which it was stated that he was about to apply for writ of habeas corpus cum causa, etc., by virtue of the provisions of section 641 of the Revised Statutes of the United States, and the failure of the trial judge to take notice (judicially) of said letter in violation of the rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the supreme court of the State of Louisiana, the accused and plaintiff in error assigns as error.

168 Ninth. Overruling motion for new trial by the trial court of the State of Louisiana, without giving the accused an opportunity to summon witnesses and establish the allegations contained therein, and hearing the law and evidence in support thereof, and to this decision and ruling, changing the form of criminal procedure, and thereby depriving the accused of due process of law and a denial of justice and arbitrary ruling, in violation of the rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the supreme court of Louisiana, the accused and plaintiff in error assigns as error.

Tenth. Overruling of trial court of motion in arrest of judgment to which was annexed a copy of the petition filed and docketed in the circuit court of the United States for the circuit and district of Louisiana, under the provisions of section 641 of the Revised Statutes of the United States, the hasty and illegal disposition of this motion by the trial court without giving the accused an opportunity to produce the law

and evidence in support thereof, on the application, construction, and interpretation of a Federal statute, is an attempt on the part of the trial court to change the form of law and criminal procedure, denial of justice and arbitrary ruling, a refusal of due process of law, in violation of the rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the supreme court of the State of Louisiana, the accused and plaintiff in error assigns as error.

169 Eleventh. That act 170 of the acts of the State of Louisiana of 1894 is unconstitutional in this, that it confers on the jury commissioners of the parish of Orleans judicial powers in the selection and qualification of citizens of the parish of Orleans, State of Louisiana, for jury services, in violation of the constitutional rights of the accused guaranteed to him by the constitution of the State of Louisiana and the 14th amendment to the Constitution of the United States and his civil and equal rights thereunder.

THOS. F. MAHER,
Atty. for Plaintiff in Error.

I hereby acknowledge service upon me of a copy of the foregoing assignment of errors.

MURPHY J. FOSTER,
Governor of La.

170 (Indorsed:) No. 718. United States Supreme Court. State of Louisiana, defendant in error, vs. Jim Murray, alias Greasy Jim, plaintiff in error. Assignment of errors. Thos. F. Maher, atty. for plf. in error.

171 (Indorsed:) Case No. 16008. Supreme Court U. S. October term, 189 . Term No., 718. James Murray, alias Greasy Jim, P. E., vs. The State of Louisiana. Assignment of errors. Filed Oct. 4, 1895.

172 (Indorsement on cover:) Case No. 16008. Term No., 718. James Murray, alias "Greasy Jim," plaintiff in error, vs. The State of Louisiana. Filed August 24, 1895.

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SUPREME COURT, U. S.
MAR 17 1896
JAMES H. McKENNEY,
CLERK.

FILED
MAR 5 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 718.

JAMES MURRAY, ALIAS "GREASY JIM," PLAINTIFF IN ERROR,

versus

STATE OF LOUISIANA.

In Error to Supreme Court of Louisiana.

BRIEF OF PLAINTIFF IN ERROR.

THOS. F. MAHER,
Attorney for Plaintiff in Error.

Thomason, Print, 526 Natchez Street, N. O.

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In Error to Supreme Court of Louisiana.

BRIEF OF PLAINTIFF IN ERROR.

May it please the Court:

This case has reached this Court on a writ of error to the Supreme Court of Louisiana. The plaintiff in error, a citizen of the United States, of the African race and color, has been convicted of murder, and sentenced to death. The man he is charged with killing was a white man. Record, pp. 32, 47.

After indictment in the trial court of the State of Louisiana, the plaintiff in error commenced his defense by a challenge to the grand jury, qualified and organized during the month of September, 1894, and known and recognized as the first grand jury organized under the provisions of Act No 170 of the Acts of Louisiana of 1894. In this challenge grave accusations are made against the jury commissioners, officials who are created under this Act, and who have the power, in the Parish of Orleans, to

select, prepare, and qualify citizens for jury services. They are charged with violating Article 116 of the Constitution of Louisiana, and the jury laws in conformity therewith, as well as a violation of the 14th Amendment to the Constitution of the United States, in this: Discrimination in the qualification and selection of citizens of the race and color of the plaintiff in error, as jurors, on account of race and color, although possessed, under the laws of the State of Louisiana and the laws of the United States, of all qualifications, legally and otherwise requisite to exercise the constitutional rights to act as grand jurors. Record, p. 2. The trial court ordered the challenge to the grand jury filed with this endorsement, "Subject to argument on face of papers at a time to be hereafter fixed by the State," with the purpose of supporting by proof the allegations contained in the challenge to the grand jury. Motions for *subpoena duces tecum* were made in which was alleged that the registrar of voters and the jury commissioners, public officials of the Parish of Orleans, State of Louisiana, had in their office certain public documents or information which was necessary and material. Record, pp. 3 and 4. The registrar of voters was requested in the motion for the *duces tecum* to furnish the total number of voters registered in the Parish of Orleans; the total number of white voters; the total number of colored voters; the total number of white voters who can sign their names; the total number of colored voters who can sign their names. At the close of the registration office, previous to the Congressional election held on the 6th of November, 1894, these motions were filed, and the trial court placed this endorsement: "Filed subject to orders." The registrar of voters is a public official, and his office is created by Act No. 123 of the Acts of Louisiana of 1880. Section 43 of that Act provides: That it shall be the duty of the supervisor of registration (registrar of voters in the Parish of Orleans), and the assessors of each parish, within (5) five days after the close of the election, to forward to Secretary of State an accurate report of the number of registered voters in their respective parishes, the total number of native and foreign born, and the number of white and colored voters respectively who can write their

names, etc. No doubt the object of this Act was to carry into effect Article 116 of the Constitution of the State of Louisiana and the jury laws passed in conformity therewith, in order to select competent and intelligent jurors, who shall have capacity to serve as grand jurors, and try and determine civil and criminal cases. There cannot be any question, either doubtful or otherwise, that the accused was legally entitled to this character of information by virtue of a *subpoena duces tecum*. Definition of *subpoena duces tecum* is the form of process issued where the witness upon whom it is served is required to bring with him any papers, books or documents in his possession, or under his control, which can be put in evidence on the trial of a case. It is settled that courts of justice possess inherent power to compel by this writ the production of written evidence which is in the possession or under the control of the witness, and there is no distinction in principle between compelling him to produce a document in his possession, and compelling him to testify in court. The motion described the information or written evidence desired with reasonable certainty, so that the witness could understand readily what he was required to produce. But no degree of particularity will be required that is practicable under all the circumstances.

In U. S. vs. Babcock, 3 Dill. (U. S.) 566, 570, Dillon, J., said: The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relevant evidence. Had the order for the *duces tecum* been issued, it would be stupid to contend that this information was privileged. Had the forms of law been complied with, this would have been the status of the case, so far as the C. P. of Louisiana, Art. 473, applies.

If one of the parties wish to obtain books, papers or other documents in the possession of the adverse party, the court shall order, on motion of the party applying for the same, that such books, papers or documents be brought into court and produced on the day fixed for the trial of the

cause. Art. 474, C. P. of Louisiana. Same rule shall apply to a third person not a party to the suit, who has in his possession any act, paper, documents or books material to the cause, which one of the parties wishes to have brought into court. Art. 475, C. P. of Louisiana: That in no case shall a person be compelled to produce papers that would subject him to a criminal prosecution. To hold otherwise than error by this tribunal of the peculiar methods of the trial court, as affirmed by the Supreme Court of Louisiana, by judicial action, in imprinting upon the face of the papers irregularity, denial of justice, arbitrary ruling, and attempting to change the form of criminal procedure without the sanction of law, would be authorizing the disregard of due process of law, which this Court must stamp as tyrannical and violative of the constitutional rights of the accused, under the Constitution of the State of Louisiana and of the United States Bill of Rights, Art. 1, Section 3, or Constitution United States, 14th Amendment, Section 1, and his civil and equal rights thereunder.

In support of these assertions, be they ever so bold, yet truthful, this proposition is unhesitatingly advanced: Had the plaintiff in error a right to file a challenge to the grand jury which indicted him? Unquestionably he did. Had he a right, under the laws of the State of Louisiana and the United States, to ask for compulsory process, *i. e., subpoena duces tecum*, to obtain evidence to support the allegations in his challenge? No contention is made that this is not legal and lawful evidence. Revised Statutes of Louisiana, Section 992. A human life, although it is in the form of a black body, is involved in this legal drama, and the plaintiff in error, from his lone cell within the dark prison walls in the Sunny South, raises his voice in humble supplication to the highest temple of justice in this country, asking of intelligence and American manhood to wrap about him his constitutional right of due process of law, as did Paul when he was accused by the Jews before Festus. He appealed to Cæsar.

Under *certiorari* the Supreme Court of Louisiana, by virtue of Art. 857, C. P., 45 La. An. p. 1295, Williams vs. Judge, from the face of the papers, would pronounce the proceedings in this case as arbitrary and irregular and character-

ize the novel ruling of the trial judge as a denial of justice. The motion for *subpoena duces tecum* on jury commissioners received the same treatment: ordered filed, subject to orders. Record, p. 4. It was a legal demand that the jury commissioners, officials created by Act No. 170 of the Acts of La. of 1894, give the names and residences of the 3500 citizens who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of the 1000 citizens they qualified and placed in the jury wheel, from which the grand jury was drawn which indicted the accused.

In the testimony taken in the case of the State vs. Heard, No. 22,325 of the docket of the Criminal District Court, said testimony being offered in evidence in this case by the State, the jury commissioners swore that they summoned during the month of September, 1894, 3500 citizens for qualification as jurors and placed 1000 names in the jury wheel. Act of Louisiana, No. 170 of 1894, provides that the jury commissioners shall select at large, impartially, from the citizens of the Parish of Orleans, having the qualifications requisite to register as voters, the names of no less than 1000 persons competent under this act to serve as jurors. A list of those names shall be prepared, certified to by the commissioners, and kept as part of the records of their office, subject to the order of the judges of the Criminal District Court of said Parish. The names in said list shall be copied on slips prepared for the purpose with the number and address corresponding to that on the lists, etc.

The testimony of jury commissioners in the Heard case was that 3500 citizens appeared before them in answer to their summons in the month of September, 1894. The object of the *subpoena duces tecum* was to get the names and residences of these 3500 citizens, and in the furtherance of justice, and in support of the allegation in the challenge to the grand jury to issue *subpoena ad testificandum*. It would establish this fact, that a discrimination had been made in failing to summon citizens of the race and color of the plaintiff in error in violation of the Constitution of this State and the jury laws in conformity therewith, and the 14th Amendment to the Constitution of the United

States. This undertaking on the part of counsel for the plaintiff in error would have been laborious, yet a moral as well as conscientious duty to his client would assist him and fortify his purpose to guard with sacred care the most precious rights (the constitutional rights under the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States and his civil and equal rights thereunder) of this black man, who had placed his life in the hands of his white brother; if biblical history and anthropology can be relied on as authority, and no man who believes in the existence of the Supreme Being can doubt the authenticity of the Holy Book. Counsel for the accused had experience with the jury commissioners, and their evasive, stupid and untruthful testimony in the Heard case (this tender of proof was made by the State in the trial court, Record, p. 5) forced him, for the protection of his client, to resort to other avenues of proof in this case, but he cannot view their desire to shield themselves otherwise than perfidious under the cowardly canopy of self-preservation, when a Statute of the United States entitled, "An Act to protect all citizens in their civil and legal rights," approved March 1st, 1875 (18 Stat., part 3, 336), which enacts that no citizen, possessing all other qualifications, which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall on conviction thereof be deemed guilty of a misdemeanor, and be fined not more than $5000.

In the case of *ex parte* Virginia, 100 U. S., p. 339, the Supreme Court of the United States held an imprisonment of a judge of a State Court, under the 13th and 14th Amendments, to be authorized. This Statute, if enforced against the jury commissioners, would embrace them within its penal arms, and cause them to bow down with proper reverence and respect to the paramount law of the land. To hold otherwise than reversible error, by your Honors, of the novel, irregular and arbitrary ruling of the trial

judge, as affirmed by Supreme Court of Louisiana, in attempting to change the form of criminal procedure, and deprive the plaintiff in error of his rights under the Constitution of this State, and the 14th Amendment of the Constitution of the United States, would open an avenue pregnant with dangerous elements to life, liberty and property, and inject into the body of our jurisprudence a serum which would annihilate due process of law.

Again, had not the plaintiff in error a legal right to file his challenge to the grand jury? Did he not have the corresponding right to move for a *subpoena duces tecum*, for evidence under the control of the jury commissioners, by a compliance with law, and suggesting that the evidence was necessary and material for his defense? No issue was raised by the jury commissioners, that the evidence sought to be had was privileged. Where does the trial judge get any authority to order any such endorsement on the challenge to the grand jury, or the motions for *subpoena duces tecum?* It will not be disputed, that under Act No. 170 of 1894, that the jury commissioners are compelled to keep as records of their office the 1000 names and the residences of the citizens they qualify and place in the jury wheel. This is a public document which was requested by the plaintiff in error. The jury commissioners are public officials. This list of 1000 names is subject to the inspection of the public. Greenleaf on Evidence, §471, p. 523, §§472, 484, 485.

The motion for *subpoena duces tecum* was regular, and accordingly there can be no dispute about this point. To get behind the mind of the trial court and discover why he made such a ruling, is beyond the power of counsel. Perhaps he, for the time, forgot that under his oath of office and the Revised Statutes of Louisiana, Section 992, the Constitution of Louisiana and the United States, by virtue of his judicial position under the State government, that it was his sworn duty to administer justice impartially, and to accord to all citizens the equal protection of the law. Unfairly, I must say, that the trial judge, upon no other assumption imaginable, must have anticipated the purpose of the defense, and in order to divert his line of legal battle, interposed this peculiar ruling, and prevented him

from establishing by competent evidence the allegations contained in the challenge to the grand jury, which would have resulted in the quashing of the indictment. The challenge to the grand jury was fixed for trial, Record, p. 4, and no action was taken by the trial court on the motions for *subpoena duces tecum*. Counsel for plaintiff in error demanded from trial court judicial action on *subpoena duces tecum* (R. p. 28); order of court, ordering counsel for plaintiff in error to produce proof without expecting to produce same through the court; affidavit of the plaintiff in error, filed February 5th, 1895, in which he swore that the *subpoena duces tecum* and the proof he sought to obtain therein were necessary and material for his defense. Record, p. 28. This strange judicial action on the part of trial court, as sanctioned by Supreme Court of Louisiana, cannot be regarded otherwise than legal coercion, and an innovation without parallel within the history of the jurisprudence of this country.

The following bill of exceptions was taken to the ruling of the trial court, in refusing to order the issuance of the *subpoena duces tecum* on the registrar of voters, filed February, 5th, 1895: Be it remembered, etc., that the entry on the minutes of this Court is a judicial act, novel and without precedent, violative of Article 6 of the Constitution of the State of Louisiana, and the 14th Amendment to the Constitution of the United States. That the order for a *subpoena duces tecum* is a judicial act, and the refusal of the Court to issue the *subpoena duces tecum* on F. C. Zacharie, registrar of voters, a public official of this State, to furnish the plaintiff in error with an extract from the public records of his office, which he alleged in his challenge to the grand jury was necessary and material to his defense in this case. The ruling of the court is prejudicial to the legal rights of the plaintiff in error, and prevents him from establishing his defense by lawful evidence, violates Article 8 of the Constitution of the State of Louisiana, and the 14th Amendment to the Constitution of the United States.

Addendum, by the Court: The so-called writ of *subpoena duces tecum* is made part of the bill; it does not describe or refer to any paper or document which the defendant required. The books or documents required by the defend-

ant should have been specified, or the information sought could have been obtained from the registrar by a writ of *subpoena ad testificandum*. I know of no law which would warrant the court to order an official to do work necessary to give the number of white and black voters in the *subpoena duces tecum* as applied for in this case.

(Signed) J. C. MOISE, *Judge*.

Without any bill of exceptions the refusal of the trial judge to order the issuance of the *subpoena duces tecum* is an error patent on the face of the record and a deprivation of the legal rights guaranteed to the plaintiff in error under the Constitution of the State of Louisiana, and the 14th Amendment to the Constitution of the United States, of compulsory process issued under authority of law, and to the benefit of due process of law. The motion for the subpoena is specific, notwithstanding the contention of the trial court to the contrary. It is a request for a public official to furnish information contained in his office under Section 43 of Act No. 123 of 1880. No such lame excuse would have been offered by the trial judge, that the motion for the subpoena was not specific enough, had he been cognizant of the case of U. S. vs. Babcock, 3 Dill. (U. S.), 566, 570, wherein Dillon, Judge, said: "The papers are required to be stated or specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the papers on the trial, so that they can be used if the court shall then determine that they are competent and relevant evidence."

Why should the trial court undertake to represent this official and change the forms of law? The duty of the trial court was to issue the subpoena, and if the party on whom it was served had any reason to offer why he should not comply with the order, it would then perhaps be within the province of the court to interpose judicial action. It strikes counsel that the trial judge was representing the registrar of voters, and argues, without the consent of that official objection, upon the hypothesis that they ought to exist, as against the constitutional rights of the plaintiff in error. It would be a reflection on the intelligence of this

court to define the difference between a *subpoena duces tecum* and *ad testificandum*, and why the trial court draws such a comparison, I am at sea in my conjecture.

To the district attorney the plaintiff in error must be grateful for offering in evidence in this case the testimony in the case of Heard, No. 22,325, of the docket of the Criminal District Court, Section A, Record, p. 5, which suggested to counsel the advisability of offering the return on *subpoena duces tecum*, served on the registrar of voters, bills of exceptions, and assignments of errors in conjunction therewith.

Here is a legal puzzle presented to the tired brain of counsel to solve. A court of concurrent power and jurisdiction, one judge following the forms of law and pleadings, Record, p. 17, the other judge refusing to do so, and offering his reasons therefor, Record, pp. 29-30. The same argument can be advanced to the refusal of the trial judge to issue the *subpoena duces tecum* to the jury commissioners.

The Bill of Exceptions reads as follows, R. pp. 29-30: That they furnish as material and necessary to the defense as evidence the names and residences of the 3500 citizens summoned before them in the month of September, 1894, as sworn to by them in the case of the State vs. Heard, No. 22,325, of the docket of this Court, and offered in evidence by the district attorney in this issue, and the names of the 1000 citizens who they qualified for jury services as grand and petty jurors; and which they placed in the jury wheel, out of which the venire was drawn and returned into court, out of which the Judge of Section A of this court selected the grand jury which indicted plaintiff in error. The refusal to grant the order for the *subpoena duces tecum* is a judicial act, violative of Article 8 of the Constitution of Louisiana and the 14th Amendment to the Constitution of the United States.

It seems that the spirit of justice must surround my client, as will be demonstrated by the incident of the State offering, and causing to be filed in this issue, the testimony taken in the Heard case. No doubt the object of the district attorney was to expedite the proceedings. An attack had been made by the defense on the jury commissioners, that they had violated the Constitution of the State, and

the Jury Act, under which their office had been created, and deprived the plaintiff in error of his civil and equal rights under the law and Constitution of the United States. Had the *subpoena duces tecum* been issued, this state of facts would have been conclusively established. The trial court anticipated the move of the plaintiff in error, and as a boomerang in this game of anticipation, the plaintiff in error now holds the strong hand.

How will this Court construe this bill of exceptions and assignment of error, signed by the Judge of Section A, Criminal District Court, without any correction, protest or objection? Record, p. 20. That the jury commissioners, being charged with a violation of their duties and depriving citizens of their constitutional rights and privileges, could not be viewed otherwise than as reluctant witnesses, and could not be expected to criminate themselves and be subject to arrest and fine of $5000 by the Federal authorities, under a Statute of the United States, if they had testified positively that they had been guilty of violating or evading directly or indirectly the Fourteenth Amendment to the Constitution of the United States, on account of race, color or previous condition of servitude, in the issuing of summons for citizens to appear before them to be qualified and put in the jury wheel of this parish. Chevally's, jury commissioner, testimony is, that in the month of September, 1894, 3500 citizens, which he and the other commissioners got their names from the City Directory and the books of the Registration Office of this parish, appeared before them for qualification; out of which 3500 names 1000 qualified and were placed in the jury wheel, out of which was drawn the *venire*, and out of which *venire* the court selected the said grand jury which indicted the plaintiff in error. Chevally testified that it was not within his knowledge how many colored men were placed on the list (the names of the 1000 qualified citizens in the jury wheel). Chevally could not state positively how many colored men were summoned to appear before them out of the 3500 in the month of September, 1894. In answer to the question, if he knew how many colored men were in the jury wheel at the present time (November, 1894), he answered, some

may look very white and may be colored, and some may be dark and be white.

It is difficult to keep a correct list of what goes in the wheel, as to white and colored. Yet, he states, a good many colored men appeared before him for qualification, and managed to testify of two colored men whose names were placed in the wheel; (2) two out of 1000 is not a fair proportion of the admission of the district attorney, that 16⅔ per cent. of the colored voters registered in the Parish of Orleans, 12½ per cent. of that amount of the total colored voters can sign their names. Record, p. 5.

This admission is taken from the returns of the registrar of voters after the general election of 1892, which is not responsive to the *subpoena duces tecum* ordered by the court on motion of counsel for defendant. Record, pp. 5, 17, 18. Even accepting this admission as a guide, there is a presumption coupled with the vacillating testimony of the jury commissioners that there has been a discrimination. Melancon said a little more than 2300 persons appeared for qualification; could not say how many colored men; and when asked if there were three, said he could not tell exactly the number. Record, p. 14. There were colored people who appeared before us, and qualified. There are a great many people with colored blood, and we do not know it, and there a great many others who you can tell by looking at them. This answer cannot be construed as otherwise than stupid or evasive, or the witness does not know what discrimination means. In cross-examination he stated that two colored men were drawn, and there a good many colored men in the jury; while Arnault does not know how many colored men appeared before them to be qualified; he says some, and he is able to discern a colored man from a white man sometimes. Record, p. 16.

King, deputy sheriff, served subpoena for jury commissioners for the month of September of this year; made personal services; none on colored people. In domicile service, don't know who lived in the house; made no personal service on colored men. Remembers that he had an attachment for a colored man; don't state whether it was

for a witness or for whom he had the attachment (may have been since his attachment to the Criminal Court in 1892). Record, pp. 6, 7.

McFarland, deputy sheriff, had 15 or 20 jury notices; none were issued for colored people that he knew. He served no colored men personally. He didn't know the people who lived in the house when he made domicile services. He was in and out of the courtroom; saw the grand jury made up for October; didn't pay much attention whether there were any colored men among them. Record, pp. 7, 8. McNeil, deputy sheriff, served notices for the jury commissioners; don't know how many; can't say those he served were colored or not; Record, p. 17; Boisdore, deputy sheriff, served between 60 and 70 summons to citizens to appear before the jury commissioners; didn't serve any "niggers." Among white there are some colored people, but don't know whether they are white or not; served 15 personally out of 60. None of the personal services were colored men; looked upon them as white men; the other 45 that I had, I knew the houses where they live, and I know all to be white people, and I take them to be white. Record, pp. 9-10. Gregson, deputy sheriff, had four or five subpoenas for jury commissioners; found two out of five. They were white, The others had removed. Didn't inquire whether the others were white or colored. Record, p. 10. Boya, deputy sheriff, had 130 notices to serve for jury commissioners in the month of September, 1894. Don't know if he served any colored men; made about 25 or 30 personal services. None of the personal services were colored men. The balance, all domicile services, were white people. Record, pp. 11-12. The evidence of the deputy sheriffs is incorporated in this Bill of Exceptions, and establishes beyond doubt that there was a discrimination by the jury commissioners in not summoning and qualifying citizens of color, who are possessed of all other legal qualifications under the Constitution of the State of Louisiana and the United States for jury service.

If the proof in support of the allegations in the challenge to the grand jury was only of a presumptive character, it

was in the power and should have been rebutted by the State with the names of the colored men who were qualified, and placed in the jury wheel and drawn out of the wheel among the venire, who could be brought into court as witnesses. Chevally, jury commissioner, says that he don't know how many names that he got from other sources. They just take some names as they think will make good jurors and qualify them. Record, p. 12. His testimony positively establishes a discrimination and impartiality when the law itself (Act 170 of 1894), imperatively commands that the jury commissioners shall secure at large, impartially, from the citizens of the Parish of Orleans, having the qualifications to register as voters, etc.

The court erred in overruling the challenge to the grand jury on the ground that there is no evidence in the record to show that the grand jury is not composed of colored men. The grand jury is, under Act No. 170 of 1894, selected by the court from the venire; hence, chosen officers of the court and part of its organized machinery, under its eyes and instructions, and by the rules of evidence, things judicially taken notice of without proof. The grand jury are officers of the court, chosen by the court, and under the law the court has a knowledge of their competency, moral status, race and color, without the necessity of any proof.

The court erred in not forcing the registrar of voters of this parish, a State officer, to furnish defendant proof, in his possession as registrar of voters, at the time of the service of the *subpœna duces tecum* on him, for a public document in his office and under his control, which defendant suggested were material and necessary as evidence in his defense on the trial of the challenge to the grand jury, and more particularly over the seasonable objection of defendant to the return of the registrar of voters, after the admission that he was a public officer, and that the evidence called for was a public record, and contained in his office, on the grounds: That the late congressional election, having been an election by districts, and not general and by general ticket voted for throughout the whole State, under which respondent construes the law, that even

if the statute required such a compilation, tabulation, classification and report, after the congressional election, it is and would be impossible for respondent to complete same in less than 60 or 90 days, as there are nearly 60,000 names to be tabulated and classified, and respondent has at his disposal no clerical force, save his chief clerk, and there is no appropriation and means whereby such clerical force could be employed and paid, unless such expenses would be defrayed by the applicant for this *subpoena duces tecum*. Act 123 of Acts of Louisiana of 1880 creates the office of registrar of voters of the Parish of Orleans. Section 4 provides that the books of registration in the Parish of Orleans shall consist of and be known by the following names: One precinct book for each precinct, one index book or poll book for each precinct, one duplicate stub book for each ward, one general index for each ward. Section 5: That the precinct register shall show and contain the date of registration, number of certificate of registration, name of voter, residence, age, color, occupation, when born, name of householder, time of residence in the State, parish and ward, oath of registration, remarks. The applicant for registration shall sign the oath of registration; in case the applicant cannot write, he shall make his mark. Section 43: That it shall be the duty of the supervisor of registration and the assessors of each parish, within five days after the close of the election, to forward to the Secretary of State an accurate report of the number of registered voters, in their respective parishes, the number of native and foreign born, the number of white and colored voters, respectively, who can write their names, and the number who make their mark. And it shall be the duty of the Secretary of State to furnish the Legislature a tabulated statement of said report within 20 days after the meeting thereof, after each general election. Under Section 43 of Act 123, of the Acts of 1880, from the answer of the registrar of voters of this parish to the *subpoena duces tecum*, it shows that he has not complied with the law creating his office, and was derelict in his duty at the time the *subpoena duces tecum* was served on him, and construes the duty of the Secretary of State as

his privilege, and misleading the trial court as to the Section of the law under which his office is operated. His other reason why he does not comply with the order of court, *i. e.*, that he has no clerical force, and that no provision has been made, is perfectly preposterous, and so shallow that it will not stand criticism. Zacharie's last reason, why he does not comply with the order of court, and which he is supported in by the court in forcing defendant to accept his bobtail compilation made up in 1892, which defendant objected to, as not a return to the *subpoena duces tecum*, is an attempt to deprive defendant of his rights in a criminal prosecution, of his rights under the Constitution of this State and the fourteenth amendment to the Constitution of the United States, to-wit., to have compulsory process for obtaining witnesses in his favor, and the defendant excepted to the ruling of the court, on the following grounds, to-wit: That Zacharie, registrar of voters, is a public officer; that the document, material as evidence for his defense, is a public document in his possession and under his control, and recorded in his office, and the defendant was entitled under the law and the Constitution of Louisiana and the fourteenth amendment to the Constitution of the United States, to a copy of the evidence he asked for, and which was ordered by the court, and should have been prepared by him, under Section 43 of Act 123 of 1880.

The court erred, for the same reason, in not ordering the jury commissioners of this parish to furnish at the request of defendant the names and residences of the 1000 citizens they qualified and placed in the jury wheel, and under Act No. 170 of 1894, a list of which it is provided should be kept in their office. With this material proof, defendant could have established positively all the allegations contained in his challenge to the grand jury which indicted him, and contradicted the testimony of the jury commissioners, who were charged with a violation of law, and who, under the circumstances, could not be otherwise than unwilling witnesses. Record, p. 9.

The admission of the State, on the trial of challenge to grand jury, of which Robert B. Jones was foreman, shows that they were all white persons, Record, pp. 1-5, and se-

lected according to law, and that the entire list of 3500 names of persons examined by the jury commissioners in September, 1894, to make up the jury, under the new law, and examined by them and qualified by them for jury services, is not complete and cannot be produced. Record, p. 5. Arnault, jury commissioner, could not give the name of one colored man that was brought before them for qualification out of the 3500, or the name of one colored man out of the 1000 in the jury wheel, Record, p. 5; yet the trial judge gives as his opinion that the evidence sought to be had could have been obtained by *subpœna ad testificandum*. The district attorney seems to be more sagacious than the trial judge. His naked statement about this incomplete list is artful as well as ingenious, and will not undergo the test of the forms of law. There is no sworn answer of the jury commissioners to any such state of facts. The question may present itself to this court, why the State admitted that the grand jury were all white. Simply this, the judge of the other section of the Criminal District Court held in his opinion in the Heard matter, R. pp. 19-22, which is a part of the record in this case, that the defense had not proved the grand jury were not colored.

Counsel for plaintiff in error, with perfect confidence, could safely rest his case with this Court, feeling certain that as this is an important constitutional question, this Court, in all fairness, will protect the sacred rights of his client, and instruct the trial judge the definition of due process of law, and make him, as well as the Supreme Court of Louisiana, respect the rights of all citizens of the United States, by administering the proper legal castigation.

On the 19th of February, 1895, plaintiff in error filed a petition for removal of cause to the circuit court of the United States for the circuit and district of Louisiana. R. p. 32. In substance, he alleged that he was a native-born citizen of the United States, of the African race and color, in custody of State authorities; that the indictment under which he was held, as presented by the grand jury, qualified during the month of September, 1894, under Act No. 170 of 1894, by jury commissioners, who violated the Fourteenth Amendment to the Constitution of the United States, by failing to summon before them for qualification

citizens of his race and color, in compliance with the Constitution of this State and jury laws in conformity therewith, and by their illegal action and conduct have excluded from jury service citizens of his race and color, although they are possessed of all other legal qualifications requisite under the Constitution of this State and the laws thereof, as well as the Constitution of the United States, to serve as grand jurors. That Act No. 170 of 1894 is unconstitutional in omitting the compliance clause in obedience to the Fourteenth Amendment, U. S. Const. That jury commissioners illegally confined their summons to white citizens only, and that there is no criminal statute of Louisiana to coerce or punish them for this illegal discrimination on account of race, color, etc.

That his rights, secured to him by the Constitution of Louisiana, and the laws providing for the equal rights of all citizens of the United States, was denied to him in this Court, in this: That on the 10th of January, 1895, he filed a challenge to grand jury which indicted him, and it was ordered filed by the court, subject to argument on face of papers, etc., and accompanying it a motion for *subpoena duces tecum* on the registrar of voters and jury commissioners of this parish, to furnish evidence, in their possession as public officers, to support as proof the challenge, which he swore was necessary to his defense and refused by the Court.

That the refusal of the court to order the issuance of *subpoena duces tecum* was a judicial act depriving him of due process of law and compulsory process in his favor, in violation of Articles 6 and 8, Constitution of Louisiana, and the 14th Amendment of the Constitution, United States. That the man he is charged with having murdered was a white man, and that the local prejudice is of such a strong character against his obtaining a fair and impartial trial (independent of the merits of the case, based solely upon the fact that he is a colored man, and the man whom he is accused of having murdered a white man), in this court or any other court in this State to which the case could be removed; by this state of facts, newspaper publications in the *Times-Democrat* and *Daily Item* (two of the leading

journals published in the City of New Orleans), with large circulation and powerful influence on the minds of their readers, and the articles published of such hostile and inflammatory character as to cause the prejudging of his case before trial. That he cannot have the equal benefit of all the laws and all of his rights in this prosecution, as enjoyed by white citizens, and that he has less chance of enforcing in this court or the courts of Louisiana, all of his rights in this prosecution as a citizen of the United States, and there is a probability of a denial to him of his said rights on every trial which may take place upon this indictment in the courts of this parish, and prays for a removal of the cause to the Circuit Court of the United States for the circuit and district of Louisiana, in conformity with Section 641 of R. S. U. S.

The plaintiff in error swears the facts contained in the foregoing petition are true and correct. After filing and reading of petition, it was overruled on same day. See endorsement on petition for removal of cause, Record, p. 32. Had the plaintiff in error filed a motion for a change of venue, under the criminal practice of Louisiana, and R. S. of Louisiana, Section 1022, would not a corresponding endorsement show on the face of the papers arbitrary rulings and a denial of justice? 41 La. An. 1082, State vs. Dent; 31 La. An. 91, State vs. Daniel.

The plaintiff in error, as will be shown by the face of the papers, was not permitted to summon any witnesses; the filing and overruling was almost one and the same act. To which was reserved a bill of exceptions. As this is the first issue of this kind within the history of the jurisprudence of Louisiana, under Section 641, R. S. U. S., which reads in substance as follows: When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunal of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest

or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for the equal rights aforesaid, or for refusing to do any act, on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of defendant, filed in said State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial to the next Circuit Court to be held in the district where it is pending. Upon the filing of such a petition all futher proceedings in the State courts shall cease, etc., and the Section makes other provisions, which counsel will, in another branch of this case, refer to.

This proceeding under Section 641, R. S. U. S., has been held to be authorized and due process of law, and not in conflict with the Constitution of the United States, in case of Strander vs. West Virginia, 100 U. S. p. 303. At page 306 of this decision, the Supreme Court of the United States, in speaking of the fourteenth amendment, said that it was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the general government, etc.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury, is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says: "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments, to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in

some cases to deny to persons of those classes the full enjoyment of that probation which others enjoy.

In the case of *ex parte* Virginia, 100 U. S. 339, the Supreme Court of the United States made itself emphatic, when it said, a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents, by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power, his act is of that of the State. The Amendment (referring to the 14th Amendment), the Court said, was ordained to secure equal rights to all persons. To render its purpose effectual, Congress is vested with the power to enforce its provisions by appropriate legislation. Such legislation must act not upon the abstract thing denominated the State, but upon the persons who are its agents, in the denial of the rights which were intended to be secured. Such is said of the Act of March 1, 1875, and is fully authorized by the Constitution. The jurisprudence of the State of Louisiana in cases of removal of causes relate to civil matters. 42 La. An. p. 52, James P. Guinalt vs. L. & N. R. R. Co.; 30 La. An. 471, Warrick Tunstall vs. Parish of Madison.

On the removal of cause the trial judge gave the plaintiff in error no opportunity to prove any of the allegations. He simply denied him the right to due process of law. The next proceeding on the part of the plaintiff in error was the filing and docketing of his petition in the Circuit Court of the United States for the Circuit and District of Louisiana, No. 12,380 of the docket of that court, made part of this record, and annexed to the motion in arrest of judgment. Record, p. 43. The petition made a resume of the judicial action of the trial judge, and charging him as an agent of the State, and clothed with the power of the State, and as

the agent of the State, with denying to the plaintiff in error his constitutional rights and the equal protection of the law. This petition was filed in accordance with Section 641, R. S. U. S. With the order of the Federal Court, considering the affidavit of petitioner as to his poverty and consequent inability to either make a deposit or give security for costs, it is ordered that he be permitted, under the Acts of Congress in such cases made and provided, to institute this proceeding *in forma pauperis*.

(Signed) CHARLES PARLANGE.

New Orleans, February 26, 1895.

Section 641, R. S. U. S., provides that after the filing and docketing of a cause in the Circuit Court of the United States, the cause shall be proceeded with therein in the same manner as if it had been there by original process. There is no case in the history of the jurisprudence of this country that the pleadings on this point has reached such a clash of jurisdiction, as between the Federal and State Court, within the knowledge of counsel, and his inquiry and research has been deep and painstaking.

Under Section 641, R. S. of U. S., this suit is original process. Plaintiff in error made every legal effort that was available to wrap about him the mantle of protective constitutional jurisprudence, under the Constitution and laws of the United States, to secure and preserve his civil and equal rights as a citizen of the United States, in order to obtain a fair and impartial trial.

Counsel for plaintiff in error regrets with deep sorrow to asseverate that the trial court of the State of Louisiana, as well as the highest court of that State, has not the respect that the Wisconsin Court has for the Federal Statute applicable to the removal of causes. The Supreme Court of that State, in passing on this question in the case of Northern Pac. R. Co. vs. McMullen, 56 N. W. 629, 86 Wis. 501, Same vs. Seip, *Id.*, says:

"Though a State court has denied an application to remove a cause to the federal court on the ground that the application was not made within the time prescribed by the federal statute, a subsequent order of the federal court that the cause be entered and docketed therein is con-

clusive of the question, and the State court has no right to thereafter retain jurisdiction of the cause and proceed with the trial." The order of the federal court had been granted, with the timely notice to the trial court of the State of Louisiana in the case of plaintiff in error. Notification of plaintiff in error to trial judge, dated February 22d, 1895. Record, p. 34. Petition of plaintiff in error, filed in Circuit Court of United States. Record, p. 43. Certificate of clerk U. S. Court. Record, p. 46.

The State of Louisiana has not dismissed this case, nor has any motion to remand been made. The State courts of Louisiana have shown a flgrant disrespect and lack of obedience and allegiance for the laws of the United States. In their opinion, the paramount laws of this great country command no respect nor cut any figure in the dealing out of justice to a citizen of the United States who is on trial for his life in their tribunals, when his guaranteed rights to his constitutional privileges under the Constitution and laws of the United States, to due process of law is involved. After the filing of the petition of plaintiff in error in the Circuit Court of the United States, a clash of jurisdiction occurred which is to be deprecated. To each and every error committed by the trial judge, to the prejudice of plaintiff in error, a citizen of the United States, the attention of the Supreme Court of Louisiana (the highest tribunal of that State) was called. Motion for new trial, filed March 7th, 1895, read and overruled; Rec. p. 40. No day fixed for hearing evidence and law in support thereof.

Bill of exceptions reserved. Same complaint from plaintiff in error; no respect for due process of law by the trial judge.

The most indecent part of this case that the attention of your Honors is called to, is the rapidity of the proceedings which plaintiff in error was compelled to resort to in order to have the Supreme Court of Louisiana view his record. A motion in arrest of judgment, filed on the same day with a motion for new trial, and overruled. Record, p. 37. To be frank with the Court, counsel had to be continuously on his guard. The fact is, which is patent on the face of

the papers, that the plaintiff in error had not only the representative of the State (the district attorney) to do battle with, but the trial court was the flanking force on the front, sides and rear, as will appear from the statements of the trial judge, attached to the bills of exceptions.

Bill of Exception A, filed March 14th, 1895, relative to application for removal of cause, which was overruled and a bill of exceptions reserved. Record, p. 48. As this petition was part of the record, and was filed, read and overruled the same day, and involves a question of law, the record discloses apparent error. 42 La. An. p. 576, State vs. Wise.

Per curiam, bills of exceptions must be presented to the court for signature, under Rule XIV of the Criminal District Court; for signature before the filing of a motion for new trial and before sentence. This bill was filed March 14th, 1895. The motion for new trial was filed and overruled March 7th, 1895; a motion for suspensive appeal was filed March 11th, 1895, returnable according to law. I cannot conceive the reason why this bill of exceptions and the four others, marked, respectively, B, C, D and E, should have been presented to me in violation of the rules of court, and after a suspensive appeal had been taken. I would not under any circumstance than that of a capital case sign these bills, but believing it just my rulings should be reviewed in order to correct any error to the prejudice of the accused, his life being at stake, I do it now under protest. On the trial of the motion to remove, every one of its allegations was positively disproved. The jury were not qualified, selected or drawn under the influence of race prejudice, but where men have been discriminated against, the basis of such action was the lack of intelligence, good reputation and moral habits; well behaved negroes are sometimes selected to serve on my juries. (Signed) JAMES C. MOISE.

As all the rulings of the trial judge are not on questions of fact, but on questions of law, and errors apparent on the face of the record, as well as real errors, Rule XIV figures only as an imbecile legal barrier. This Court is too well disposed to favor the life, liberty and constitutional rights

of citizens to agree with this part of the statement of the trial judge; and for his information, counsel will state his object in presenting the bills of exceptions was to keep before the legal conscience of the judge *a quo* the many errors he had committed to the prejudice of the plaintiff in error. Rule XIV could not apply to the bill of exceptions "B," reserved to the overruling of motion for new trial, or bill of exceptions "E" to overruling motion in arrest of judgment, or from the statement of the trial judge, he expected the filing of the bills of exceptions before the motions were written, presented or filed.

The trial judge subsequently discovered that the Supreme Court viewed his qualified protest with as much respect as it did the constitutional rights of plaintiff in error.

The face of the record disproves the statement of the trial judge, relative to the petition for removal of cause to U. S. Circuit Court, in Bill of Exception A. Record, p. 32. It was filed, read and overruled on the same day. No evidence was heard, or allowed to be heard, and a bill of exceptions was reserved and filed on March 14th, 1895. Record, p. 48. How charitable and just was the trial judge! He was anxious that the search light of the appellate and supervising power of the highest court of Louisiana should examine his rulings; yet, he qualified his desire and tells that tribunal that he does it under protest. Minos could not be more charitable.

Bill of exceptions "B," filed March 14th, 1895, appertaining to motion in arrest of judgment. Court ruled that motion in arrest of judgment can be made only for errors patent on the face of record. As to what pertains to a clash of jurisdiction, and where, as in this case, the petition is annexed to the record and charges error on the face of the same, is a subject perhaps far beyond the conception of the trial judge. R. p. 51. The Supreme Court of Louisiana was called upon for the first time to pass upon this question, and that Court relegated plaintiff in error to this Court for decision. R. p. 60.

Bill of Exceptions "D," filed March 14th, 1895, relative to testimony of King Jones, read on the trial, and taken at preliminary examination is also a matter of record, and the

strenuous objection of the accused to its use, and the subsequent bolstering up of due diligence by the State.

Bill of Exceptions "C" is on motion to quash, and has been fully explained in another part of this brief. The anticipated ruling of the trial court and the filing of the assignments of error in Heard case is supported by State ex rel. Schlater vs. Judge, 40 La. An. p. 809.

It is exactly what the trial judge expected counsel to do under Rule XIV, in relation to bills of exceptions on overruling of motion for new trial and motion in arrest of judgment on the same day.

The trial judge neglected to state in his addendum to bills of exceptions, that he overruled motion for new trial and motion in arrest of judgment on the same day. Record, pp. 40-42.

Bill of Exceptions "B" is one overruling motion for new trial; the record will show that the motion was filed and overruled the same day, and a bill of exceptions reserved. Record, p. 47. The allegations in new trial were sworn to by plaintiff in error. The disposition of the motion by the the trial court will speak for itself. No opportunity was allowed plaintiff in error to support the allegations of misconduct of jury, etc., by witnesses, no day was fixed for the hearing. The motion for new trial, the trial court, in statement to bill of exceptions, assumes a state of facts which could not have been brought before this court, only by evidence as to misconduct of jury, evidence which never was heard or permitted to be heard. The charge of the judge to the jury is in the record, and the part of it complained of is embodied in the motion for new trial. Counsel's contention is, and he is borne out by the record, that his client was deprived of due process of law and compulsory process. The constitutional provision which guarantees to accused the right to compulsory process and due process of law, is not a dead letter, and will be enforced by this court.

On the examination of this case and the application of the principles of well settled law, the court, being of the impression there has been irregularities calculated to influence the result of a trial unfavorable to the plaintiff in error, a new trial will be granted.

Plaintiff in error did everything within his limited power and knowledge of the law to clearly point out to the highest court of Louisiana, each and every deprivation of his rights as a citizen of the United States, to due process of law, in order to obtain a fair and impartial trial as guaranteed to him by the constitution and laws of the United States. He followed with strict attention the instructions of this court in the case of Robb vs. Connolly, 111 U. S., and cited in the case of *In re* Wood, 140 U. S., p. 286. For, "upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceedings before them;" and, "if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest Court of the State in which the question could be decided to this Court for final and conclusive determination." What graver complaint can plaintiff in error make to this Court, as a citizen of the United States, that on a trial for his life that he was deprived in the State Court of Louisiana of the right of due process of law and compulsory process? The highest Court in the State gave plaintiff in error no relief, it did him a more serious injury; it distorted the record, when, in its opinion, Record, p. 57, it asserts that the jury commissioner was called as a witness, when as a matter of fact the Record, p. 5, shows that the State filed in evidence, and as part of the record herein, the evidence taken in another case, State of Louisiana vs. George Heard, No. 22,325. (Under Article 130 of the Constitution of Louisiana, the Criminal District Court of the Parish of Orleans is organized and divided into two sections, A and B; each section is presided over by a different judge, who do not rule the same way when proper and legal application is made to them for compulsory process, *i. e., subpoena duces tecum*, pp. 9, 17, 28, 57). Strange, indeed, is the inconsistency of the highest Court of the State when it speaks (in its opinion at page 57 of Record): "This of course depended upon the proof, of which the defendant

carried the burden. The Record, at page 5, shows that the State assumed the *onus probandi*, and that no witnesses except Louis Arnault was sworn and examined by counsel for defendant (one of jury commissioners, R. p. 16), during which it was admitted that the jury commissioners, being placed on the witness stand, answered that they were unable to give the name of a single colored or white man. Same page in the record, that the list of 3500 names of persons examined by the jury commissioners in September, 1894 (this trial of the challenge to the grand jury February 2d, 1895, five months afterwards), to make up the jury wheel under the new law, and examined by them to qualify for jury service, is not complete and cannot be produced, yet the jury commissioners, in the Heard case, at Record, p. 12, testify that they issued about 3500 summons. Plaintiff in error only calls the Court's attention to this testimony in order to make clear the peculiar effort to forestall the ends of justice. However, the jury commissioner stated, Record, p. 12, that he had the list of the 1000 names. Why did he answer that he had the list of the 1000 names in the wheel? Because Act No. 170 of the Acts of Louisiana of 1894 compels him to keep the names and residences of the 1000 names in the jury wheel. This Court will readily perceive why the *duces tecum* was asked. The legal right to this process of law cannot be disputed; it never went forth on its judicial mission; it was choked to death in its infancy by the trial court, and the highest court of the State sanctioned and approved of the refusal of due process of law to plaintiff in error, a citizen of the United States. The highest court of the State in its opinion asserts at R. p. 57, for what purpose counsel for plaintiff in error cannot perceive, that the trial judge cited and relied upon State vs. Joseph, 45 La. An. 905. The record at p. 18 does not bear out this assertion. This was the opinion of another judge who was trying a case of manslaughter in another court, and his decision was not before it for review on appeal. The case that trial judge Ferguson cited in the 45 La. An., if before this court on writ of error, would not stand the legal test.

Here is an astonishing statement of the highest court of the State of Louisiana, to which plaintiff in error could

appeal to have his constitutional rights as a citizen of the United States preserved, when it says, in its opinion, Record, pp. 57, 58:

"With regard to the defendant's complaint as to the action of the court, with reference to his motion for a *subpoena duces tecum* on the registrar of voters and the jury commissioners, nothing need be said, because they cut no figure in the case, since the testimony which was elicited from the witnesses clearly show that his challenge to the array was groundless, as these subpoenas could not have practically affected the result in the face of the positive testimony adduced on the trial of the motion. It might be conceded, for argument, that the proceedings under them were irregular, though it is not the case by any means, as the subpoena directed to the jury commissioners shows that it was intended only as a means of eliciting information, and not for the purpose of obtaining books and papers, which was particularly described therein." As to the first proposition advanced by the highest court of Louisiana, that due process of law and compulsory process, as guaranteed to citizens of the United States, cut no figure in the temple of justice, then manhood's rights, as authoritatively commanded to be respected by the highest court of the Union, had existence only in the past. Again counsel will assert that no evidence of the jury commissioners was taken in this case, and is supported in his statement to this court by the Record, pp. 4-5. Even the concession of the highest court of the State, for argument sake, that the proceedings were irregular, cut no figure, although a citizen of the United States was on trial for his life. The *subpoena duces tecum* asked for was intended to support the allegations set forth in the challenge to the grand jury, and had its issuance been permitted as the law directs, each and every person summoned before the jury commissioners, and the 1000 names in the jury wheel, would have been brought into court by *subpoena testificandum*. That was the character of proof the plaintiff in error was seeking to obtain. The trial court and the jury commissioners well knew what the plaintiff in error could prove, and would establish, had the *duces tecum* issued as provided by law, and it was

not to elicit information, but to obtain the best evidence procurable. Counsel again must call the attention of this Court to the palpable error of the highest court of the State, when, in its opinion at R. p. 57, it says that: "The evidence shows, that there were some persons of color who were members of the grand jury who found the bill, when the fact is, that the R. p. 5, shows that the State admitted that the grand jury, of which Robert B. Jones was foreman, were all white people. Endorsement on indictment: No. 22,494, State of Louisiana vs. Jim Murray, *alias* Greasy Jim; indictment for murder; a true bill; Robert B. Jones, foreman of grand jury; R. p. 2. Plaintiff in error respectfully calls the attention of this Court to his application for rehearing. R. p. 61. Pointing out to the highest court of the State of Louisiana the many errors in the decree, in this, to-wit: In the assumption of the court, under the peculiar status of this case in the trial court, that the *onus probandi* was on the defendant, when, as a matter of fact, the court *a qua* refused to defendant due process of law, whereby the allegations set forth in the challenge to the grand jury would have been sustained, thereby depriving the defendant of due process of law, and compulsory process, as provided for in his favor under the Constitution of Louisiana, and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder (Bills of exception, R. pp. 28, 29, 30). That the court erred in accepting the testimony of the jury commissioners in the Heard case as proof in this case, as the record shows that this tender of proof was made by the State and not the defendant (R. p. 5), the jury commissioners not being witnesses for defendant, nor their evidence taken in the Heard case in another court. That the court erred when it states that the defendant's counsel also called and interrogated as witnesses quite a number of deputy sheriffs who served summons, etc., when, as a matter of fact, no deputy sheriffs were summoned by the defendant, nor any testimony given by them in this case. R. p. 5. The court erred when it asserts that there were some persons of color who were members of the grand jury who found the bill, etc., when, as a matter of fact, the record shows, at p. 5, the admission of the State that the grand jury which indicted

the accused were all white persons. The court erred in confounding the Heard case with this case. The trial judge in this case never cited and relied upon State vs. Joseph, 45 La. An., p. 905, R. pp. 18-19. The trial judge in this case never gave any written reasons for overruling any of the pleas of defendant (R. p. 30, overruling challenge to grand jury; p. 32, overruling motion to quash; p. 32, overruling application for removal of causes to U. S. Circuit Court. Overruling motion for new trial and motion in arrest of judgment, Record, p. 47).

The court erred in asserting that defendant's complaint, as to the action of the court with reference to his motion for *subpoena duces tecum* on the registrar of voters and the jury commissioners, "cut no figure in the case" (Record, p. 58), and not decreeing the issuance of these processes as a legal right, which the defendant was entitled to under the Constitution of Louisiana, and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and the instrument of getting legal evidence in order to establish his allegations in the challenge to the grand jury; that the jury commissioners had violated the law, or evaded the law, either directly or indirectly, by failing to summon for jury services citizens of the race and color of defendant, in violation of the Constitution of this State, and the jury laws passed in pursuance thereto, and had made the discrimination to the prejudice of the defendant, as complained of in the challenge to the grand jury.

The Court erred in assuming that the *subpoena duces tecum*, directed to the jury commissioners, was intended only as a means of eliciting information, and not for the purpose of obtaining books and papers which were particularly described therein, and not regarding its mission as a medium of getting legal evidence to obtain a list of the names and residences of the citizens qualified by them and placed in the jury wheel from which the venire was drawn and the grand jury which indicted the defendant was selected, a list which they are compelled, under the provisions of Act 170 of 1894, to keep in their office. The court erred in not passing on the misconduct of the jury, as

alleged in the sworn motion for a new trial, and the failure of the trial court to allow the defendant an opportunity to prove the allegations therein contained, as appertaining to the reasonable doubt, to which exception was reserved, and bills of exceptions filed thereto, and assigned as error in this court. Record, p. 55.

That the court erred in not decreeing that after the filing of the application for removal of cause in the trial court to the Circuit Court of the United States, and the filing and docketing of the case in that tribunal under the provisions of Section 641, Revised Statutes of United States, and the subsequent order of the federal court that all further proceedings thereafter, without any motion to remand, was *coram non judice* in the State court, and the State court had no right thereafter to retain jurisdiction and proceed with the trial.

Plaintiff in error, in support of the application for rehearing, filed the following brief in the highest court of the State. (Record, p. 63): "May it please the Court: With a feeling of modesty that gnaws at my soul, I again approach this honorable tribunal with a trepidity that may be classed perhaps as presumption, yet duty to my unfortunate client forces me to clash, with my limited ability, with the opinion of this court, for which I have the highest regard, in my efforts to protect the sacred rights of my client under the Constitution, and impelled as I am solely by the conviction, which is strongly fixed upon my mind, that the position assumed in the first hearing, as to some of the points at issue, is correct, I therefore enter upon the discussion with profound diffidence and utmost respect for the learned judge, who, as the organ of the court, delivered the opinion. Pushed onward by a sense of duty to him I humbly represent, I am compelled to take issue with the court upon what I consider to be the salient point affecting this case, and to differ from the court entirely in the views and construction it placed thereon. My first contention is, that the grave and fundamental error is the refusal of the trial judge to order the issuance of the *subpoena duces tecum* after all prerequisites required by law had been complied with by the defendant, in order to have it go forth on its

judicial mission. The *subpoena duces tecum* is the attraction around which all other complaints of defendant revolve in ancillary orbits. How must I construe due process of law and compulsory process? The Court must stamp this process as due process of law and compulsory process *ex necessitate*, and the refusal to grant it by the court *a quo*, a deprivation of due process of law to the defendant.

"The jury commissioners were not witnesses for the defendant in this case, but had testified in another case in Section "A" of the Criminal District Court. Their evidence in that case was offered by the State, and the defendant, for the purpose of contradicting them and their testimony, applied by motion for *subpoena duces tecum*. He swore that the evidence sought to be had was necessary and material in his defense, *i. e.*, the list of 1000 names and residences of the citizens that they qualified and placed in the jury wheel, out of which the venire was drawn from which the grand jury was selected that had indicted defendant. Under Act No. 170 of 1894 the list of the names and residences are part of the records of their office. Counsel for defendant earnestly contend that it was not for the purpose of eliciting information that he applied for the *subpoena duces tecum*, but to establish the allegations contained in the challenge to the grand jury. Your Honors do not hold that he did not have as a matter of legal right by virtue of *subpoena duces tecum*, the only medium by which he could get the evidence sought to be had; this list is a public document, under the control of the jury commissioners. Had the list been furnished, the defendant would have issued *subpoena testificandum* for the 1000 citizens in the wheel, and the testimony would have shown positively that the discrimination complained of did exist as a matter of fact. Even admitting, for the sake of argument, that the object of the *subpoena duces tecum* was for the purpose of eliciting information, the trial court could not, under the rule of procedure, refuse the issuance of the *duces tecum*, as such a judicial act has no sanction. Amer. & Eng. Ency. of Law, pp. 173 and 174, Vol. 24. The jury commissioners could have no lawful or reasonable excuse for withholding the list.

"Your Honors have held correctly, but qualifiedly, that the proceedings were irregular. Record, p. 58. Due process of law and compulsory process, where life and liberty is the stake, is the law which is essential to the preservation of our social system and civilization, and rest upon the eternal and immutable principles of justice and human right.

"The proceedings being irregular, I must invoke the doctrine of *stare decisis*. 30 La. An. p. 540, 2d paragraph.

"Defendant respectfully contends that his pleadings under the provisions of Section 641 of the Revised Statutes of the United States were in strict conformity with that statute, and has the approval of the United States Supreme Court. That Court has authoritatively sanctioned this proceeding for removal of cause to the Federal Court from a State court, preceding trial. Strauder vs. West Virginia, 100 U. S. 303.

"After the filing and docketing of a petition, under Section 641 R. S. U. S. in the circuit court, the State court was ousted of its jurisdiction.

"The refusal of the State court to allow the removal of cause to the federal court cut no figure, after the filing and docketing of the cause in the federal and the order as was allowed by the judge thereof, as was done in this case.

"The State court had no right thereafter to retain jurisdiction, after legal notification in the motion in arrest of judgment. Record, p. 43; Northern Pacific R. Co. vs. McMullen, 56 N. W. 629; 36 Wis. 501.

"In the closing chapter of this case, I implore of your Honors to grant a rehearing, impressed as I am with the firm belief that the court *a qua* closed the doors of due process of law to my client, and thereby deprived him of his constitutional rights guaranteed to him by the Constitution of this State and the Constitution of the United States and his civil and equal rights thereunder.

Respectfully submitted,

THOS. F. MAHER,

Attorney for Defendant."

ASSIGNMENT OF ERRORS. Filed October 4th, 1895. R. p. 82.

Supreme Court of the United States.

State of Louisiana, Defendant in Error,
vs.
James Murray, alias Greasy Jim, Plaintiff in Error. } No. 718.

Now into this honorable court comes the accused and plaintiff in error and assigns the following errors committed to his prejudice during the trial of his case in the trial court of the State of Louisiana, which said errors were passed upon and affirmed by the Supreme Court of the State of Louisiana:

First. Endorsement of the trial court on the challenge to the grand jury, "filed subject to argument on face of papers, etc." R. p. 3. This endorsement changes the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent, contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of Louisiana and the 14th Amendment to the Constitution of the United States and his civil and equal rights thereunder. And to this decision and ruling of the trial court of the State of Louisiana, as affirmed by the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Second. Endorsement of trial court of the State of Louisiana on motion for *subpoena duces tecum* on F. C. Zacharie, registrar of voters, "filed subject to orders." R. pp. 4, 28, 29. The allegations in said *subpoena duces tecum* alleged that certain evidence was material to support the challenge to the grand jury. Said endorsement changes the form of criminal procedure and the forms of law, thereby depriving the accused of due process of law, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder. And to this decision and ruling of the trial court of the State of Louisiana, as affirmed by the Supreme Court of Louisiana, the accused and plaintiff in error assigns as error.

Third. Endorsement of trial court of State of Louisiana, on motion for *subpoena duces tecum* on jury commissioners endorsed, "filed subject to orders." Record, p. 4. This judicial action of the trial court of the State of Louisiana, changes the form of criminal procedure, thereby depriving the accused of due process of law, and endeavoring to establish a precedent contrary to the forms of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana, and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal to the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Fourth. Extract from the minutes of the trial court of the State of Louisiana, of date February 5th, 1895, on resumption of argument to challenge to grand jury, in which the trial court ruled that counsel for accused must produce proof, without expecting to produce same through the court. Record, p. 28. This judicial action or ruling of the trial court of the State of Louisiana changes the form of criminal procedure, thereby depriving the accused of due process of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment of the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of Louisiana, the accused and plaintiff in error assigns as error.

Fifth. Compelling accused, by judicial coercion of trial court, to swear to an affidavit as to the necessity and materiality for a *subpoena duces tecum* on Francis C. Zacharie, registrar of voters of the Parish of Orleans, and the jury commissioners of the Parish of Orleans, to furnish evidence in their possession in support of the allegations contained in the challenge to the grand jury. Record, p. 28. This decision or ruling of the trial court of the State of Louis-

iana changes the form of criminal procedure, thereby depriving the accused of the benefit of due process of law, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder. To this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of Louisiana, the accused and plaintiff in error assigns as error.

Sixth. Overruling by trial court of the State of Louisiana of motion to quash indictment, on the grounds of the unconstitutionality of Act No. 170 of the Acts of the Legislature of the State of Louisiana, of the year 1894, Record, p. 32, to the injury and prejudice of the accused, in violation of law and the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Seventh. Overruling by trial court of the State of Louisiana, without giving the accused an opportunity to summon witnesses, and the hearing of the law and the evidence on the application of the petition for removal of cause to the Circuit Court of the United States for the Circuit and District of Louisiana, Record, pp. 32, 48, thereby depriving the accused of the benefit of due process of law and ignoring the provisions of Section 641 of the Revised Statutes of the United States, with the judicial purpose of treating with defiance and contempt the Federal law on this subject, and a denial of justice and arbitrary ruling, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and the civil and equal rights thereunder, and to this decision and ruling of the trial court of

the State of Louisiana, as affirmed on appeal to the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Eighth. Proceeding with the trial of the accused by the trial court of the State of Louisiana, after notification by letter from counsel of the accused, of date February 22d, 1895, in which it was stated that he was about to apply for a writ of *habeas corpus, cum causa*, etc., by virtue of the provisions of Section 641 of the Revised Statutes of the United States, and the failure of the trial judge to take notice (judicially) of said letter, in violation of the rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Ninth. Overruling motion for new trial by the trial court of the State of Louisiana, without giving the accused an opportunity to summon witnesses and establish the allegations contained therein, and hearing the law and evidence in support thereof, Record, pp. 40, 48, 49, and to this decision and ruling, changing the form of criminal procedure, and thereby depriving the accused of due process of law and a denial of justice and arbitrary ruling, in violation of the rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of Louisiana, the accused and plaintiff in error assigns as error.

Tenth. Overruling of trial court of motion in arrest of judgment, to which was annexed a copy of the petition filed and docketed in the Circuit Court of the United States for the Circuit and District of Louisiana, under the provisions of Section 641 of the Revised Statutes of the United States, Record, pp. 42, 43, 44, 51, the hasty and

illegal disposition of this motion by the trial court, without giving the accused an opportunity to produce the law and evidence in support thereof, on the application, construction, and interpretation of a Federal statute, is an attempt on the part of the trial court to change the form of law and criminal procedure, denial of justice and arbitrary ruling, a refusal of due process of law, in violation of the rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States, and his civil and equal rights thereunder, and to this decision and ruling of the trial court of the State of Louisiana, as affirmed on appeal by the Supreme Court of the State of Louisiana, the accused and plaintiff in error assigns as error.

Eleventh. That Act 170 of the Acts of the State of Louisiana of 1894 is unconstitutional in this, that it confers on the jury commissioners of the parish of Orleans judicial powers in the selection and qualification of citizens of the parish of Orleans, State of Louisiana, for jury services, in violation of the constitutional rights of the accused guaranteed to him by the Constitution of the State of Louisiana and the 14th Amendment to the Constitution of the United States and his civil and equal rights thereunder.

THOS. F. MAHER,
Atty. for Plaintiff in Error.

I hereby acknowledge service upon me of a copy of the foregoing assignment of errors.

MURPHY J. FOSTER,
Governor of La.

The case of plaintiff in error presents stronger grounds for the interference of this court, and its protective mandate for the enforcement of a right guaranteed to a citizen of the United States than does the case of Neal vs. Delaware, 103 U. S., p. 395. Under the law of Louisiana plaintiff in error's challenge to the grand jury which indicted him was timely and seasonably made. Judicial action in this case interposed its objection to the issuance of due process of

law, *subpoena duces tecum*. In the case of Neal vs. Delaware the attorney general, who represented the State, objected. This court said at p. 397, Neal vs. Delaware: "That the action of those officers in the premises is to be deemed the act of the State, and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States."

In conclusion, counsel for plaintiff in error will say, at the altar of the highest temple of justice in this Union, before the high priest of the law, that he most solemnly protested, orally and in writing, to the judicial murder of his client, an American citizen, in the trial court and the highest court of the State of Louisiana, of being deprived of that fair and impartial trial guaranteed to every citizen of the United States, and instead of redressing the wrong, the highest court of the State only threw out a sop to counsel and applauded his zeal and vigor, and closed the door of due process of law to his client. Counsel for plaintiff in error, as he is now before the unapproachable oracle of due process of law, where the legal rights of all citizens must be protected and where prejudice or oppression cut no figure, and armed as he is with the Constitution of the United States and the authoritative mandates of this tribunal, he can demand without trepidity that the judgment of the Criminal District Court of the parish of Orleans, State of Louisiana, as affirmed by the Supreme Court of Louisiana, be reversed, and the judgment and verdict set aside, and that this Court order the State courts of Louisiana to give the plaintiff in error a fair and impartial trial, and not to deprive him of his constitutional right to due process of law, as guaranteed to him by the Constitution and laws of the United States.

Respectfully submitted,

THOS. F. MAHER,

Attorney for Plaintiff in Error.

SYLLABUS.

The Constitution of the United States is the supreme law of this country.

Due process of law is a constitutional right guaranteed to every citizen of the United States.

The refusal to grant due process of law to a citizen of the United States, in a civil or criminal case, in any court, State or Federal, is the denial of a constitutional right, and violative of the Constitution of the United States. All courts must respect and act in obedience to the Constitution and laws of the United States.

Subpoena duces tecum and testificandum is due process of law, and when the proper form of law is complied with for the issuance of the process, a refusal to permit it to go forth on its judicial mission is a denial of a legal right.

The trial, conviction and sentence to death of a citizen of the United States, in any court, State or Federal, when the right to due process of law has been denied, will be reversed by this Court.

Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceedings before them, and, if they fail therein, and withhold or deny any rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this Court for final and conclusive determination. Robb vs. Connolly, 111 U. S. 624, 637; *in re* Wood, 140 U. S., p. 278.

A State may exercise her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be the action by one of these agencies or by another, Congress, by virtue of the fifth section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded

by either the Legislative, the Executive or Judicial department of the State. The mode of enforcement is left to its dicretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged. Virginia vs. Rives, 100 U. S. 303.

The inhibition contained in the 14th Amendment means that no agency of the State, or of the officers or agents by whom her powers are exerted, shall deny to any person within her jurisdiction the equal protection of the laws.

Whoever, by virtue of his public position under a State government, deprives another of life, liberty or property, without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition; and as he acts in the name of and for the State, and is clothed with her power, his act is her act.

Otherwise the inhibition has no meaning, and the State has clothed one of her agents with power to annul or evade it. *Ex parte* Virginia, p. 339, 100 U. S.

The question of the exclusion of citizens of the African race from the list of grand jurors had been made during the trial in the Criminal District Court, and no opportunity allowed plaintiff in error, through the medium of due process of law, to support his challenge to the grand jury.

Subpoena Duces Tecum—definition: The *subpoena duces tecum* is the form of process issued where the witness, upon whom it is served, is required to bring with him any papers, books or documents in his possession or or under his control, which can be put in evidence on the trial of a cause. Bouvier Law Dict., 676; 1 Greenlief Ev. (14th Ed.) §309; 1 Wharton Ev., §377; 3 Bl. Com., 382; Lane vs. Cole, 12 Barb. (N. Y.) 680; Bull vs. Loveland, 10 Pick. (Mass.) 9; Central National Bank vs. Arthur, 2 Sweeny (N. Y.) 194; Davenbagh vs. McKinnie, 5 Cow. (N. Y.) 27; Aiken vs. Martin, 10 Paige (N. Y.) 499; Carlton vs. Litten, 4 Blackf.

(Ind.) 1; Townshend vs. Townshend, 7 Gill. (Md.) 10; Martin vs. Williams, 18 Ala. 190; Amey vs. Long, 9 East. 473; Chaplain vs. Busiere, Son & G. 198; Am. & Eng. Law, Vol. 24, p. 173.

The exclusion, because of their race and color, of citizens of the African descent from the grand jury that found, and from the petty jury that was summoned to try, the indictment, if made by the jury commissioners, without authority derived from the Constitution and laws of the State, was violative of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress, and the remedy for any failure in that respect is ultimately in this court upon writ of error. Neal vs. Delaware, 103 U. S. p. 370.

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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 718.

JAMES MURRAY, ALIAS "GREASY JIM,"
PLAINTIFF IN ERROR,

versus

STATE OF LOUISIANA,
DEFENDANT IN ERROR.

Brief on Behalf of State, Defendant in Error.

M. J. CUNNINGHAM,
Attorney General of Louisiana.

ALEXANDER PORTER MORSE,
Of Counsel.

Supreme Court of the United States.

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versus

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Brief of Behalf of State, Defendant in Error.

SYLLABUS.

Only federal questions can be reviewed by this Court on writs of error to the Supreme Court of a State.

The interpretation placed by a Supreme Court of a State upon its constitution and laws will be accepted and followed by this Court.

Where a State court allows a man the same process for procuring evidence, and withholds from him no remedy, enjoyed by other citizens, he is not denied the equal protection of the laws, nor are his privileges or immunities abridged, within the meaning of the 14th Amendment to the Constitution of the United States.

The selection of jurors is a ministerial, not a judicial act (100 U. S. 339); and a law of a State is valid which, in obedience to a mandate of its constitution, confers upon jury commissioners the powers necessary for the selection of competent and intelligent jurors.

A petition for the removal of a cause from a State to a Federal court, because of unjust discrimination, on account of race or color, in the selection of jurors, which fails to allege that the constitution and laws of the State exclude colored men from service on juries, presents no case for removal under R. S. 641. Virginia vs. Rives, 100 U. S. 313; Neal vs. Delaware, 103 U. S 370.

Where colored citizens are not excluded from jury service, because of their color, an indictment will not be quashed, nor a challenge to the venire or grand jury be maintained, although no colored man is drawn. 100 U. S. 313; 45 A. 903; 42 A. 255.

The burden of proof is on the party complaining, but where, as in this case, the proof shows there was no discrimination on account of race or color, and that there were colored men on the venire challenged, there is no excuse for the challenge.

STATEMENT.

The accused, plaintiff in error, was indicted for murder on October 30th, 1894, before Section B of the Criminal District Court for the Parish of Orleans, Hon. James C. Moise, Judge. The jury wheel had been filled, and the venire for the October term drawn therefrom in September, 1894. The grand jury which indicted him had been impaneled in October, selected from the venire drawn in September, to serve for three months, October, November, and De-

cember, 1894, in accordance with the provisions of Act 170 of 1894. On December 13th, he pleaded "not guilty," reserving the right to withdraw his plea.

On January 10th, 1895, his counsel filed what he called a challenge to the grand jury, or challenge to the venire from which the grand jury was selected, claiming that the grand jury was not a legally constituted body, on the ground that the jury commissioners, in qualifying and selecting the citizens as jurors, did not conform with Article 116 of the Constitution of Louisiana and the Acts of the Legislature in conformity therewith, and the 13th, 14th, and 15th Amendments to the Constitution of the United States; that they did not follow the forms of law, and violated Article 188 of the Constitution of the State and discriminated in favor of one class of citizens to the prejudice and injury of the accused, a man of color, in violation of the 14th Amendment to the Constitution of the United States; that they violated Article 116 of the Constitution of the State by excluding one class of citizens; and that they discriminated against citizens of the race and color of the accused, on account of race, color and previous condition of servitude, in violation of the 14th Amendment to the Constitution of the United States.

On the same day counsel for accused filed a motion for a *subpœna duces tecum* ordering the registrar of voters to "furnish the total number of voters registered in this Parish, the total number of registered white voters, the total number of registered colored voters, the total number of white voters who could

sign their names, and the total number of colored voters who could sign their names, at the close of the registration office of this Parish previous to the last congressional election, held on the 6th of November, 1894," representing that this information was necessary and material as evidence to support his challenge to the grand jury. On the same day, and on the same representation, he filed a motion for a *subpœna duces tecum* to the jury commissioners, commanding them "to furnish the Court, on the trial of the challenge to the grand jury, the names and residences of the thirty-five hundred citizens who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of the one thousand citizens who they qualified and placed in the jury wheel, from which the present grand jury was drawn."

On February 2nd, 1895, the day fixed for the hearing of the challenge to the grand jury and the motions for *subpœnas duces tecum*, the minutes show that the trial of the challenge to the array was proceeded with without objection, that the State filed in evidence the evidence taken before Section A of the Court in the case of State vs. George Heard on the trial of a similar challenge to the venire or grand jury filed and tried by the same counsel who represents the accused herein. Counsel made no objection to this procedure, and then filed in evidence the assignment of errors and bills of exception which had been taken by him in the Heard case, the return of the registrar of voters to a similar *subpœna duces tecum* in that case, and

the reasons assigned by the judge of Section A for overruling the challenge to the grand jury in the Heard case.

Upon the reading by the district attorney of the return of the registrar of voters to the *subpœna duces tecum* in the Heard case, which had been filed by the defense, his counsel then presented to the Court his motion for *subpœna duces tecum* pending in this case, which was overruled, and a bill of exceptions reserved. It appears that the district attorney then admitted that the grand jury which found this bill was composed entirely of white men selected according to law, and that the list of thirty-five hundred citizens examined in September, 1894, to fill the jury wheel under the law was not complete and could not be produced. One of the jury commissioners, placed upon the stand by counsel for the accused and asked to give the name and address of a single colored man, answered "they were unable to give the name or address of a single colored or white man." The evidence taken in the Heard case will show that all the jury commissioners were fully examined as to whether colored men were discriminated against in filling the jury wheel.

On February 5th counsel for accused presented and had signed and filed two bills of exception. Number one was taken to what he considers the orders of the Court in having the challenge and *subpœna duces tecum* filed "subject to argument on face of papers," claiming this order to be in violation of Article 6 of the State Constitution and the 14th

amendment to the Constitution of the United States, and to the refusal to issue a *subpœna duces tecum* to the registrar of voters, claiming this refusal to be in violation of Article 8 of the State Constitution and the 14th amendment. The second bill was taken to the refusal of the Judge to order a *subpœna duces tecum* to the jury commissioners, claiming such refusal to be violative of Article 8 of the State Constitution and the 14th amendment. On the same day, February 5th, the challenge to the array of grand jurors in this case was overruled.

On February 8th counsel filed a motion to quash the indictment on the ground that Act 170 of 1894, amending one section of the jury law, under which the grand jury was impanelled, was unconstitutional, null and void, because it was a special or local law and Articles 48 and 154 of the State Constitution and the laws laws thereunder and the jurisprudence of the State Supreme Court had not been complied with in its passage, and also because it "does not contain the compliance clause of the 13th, 14th and 15th amendment to the Federal Constitution, provided for in all jury laws in this State, providing that there shall be no discrimination, on account of race, color, or previous condition of servitude." On the 9th this motion to quash was argued and on the 11th it was overruled.

On February 19th, counsel presented to the Court an application for the removal of the cause to the Federal Court, which motion was overruled and a bill reserved. The accused was then again arraigned. The

application for the removal of the cause to the United States Circuit Court, R. 32, was based upon the complaint that the jury commissioners violated the 14th amendment to the Constitution of the United States by failing to summon before them for qualification, to have their names placed in the jury wheel so that they might be drawn as jurors, citizens of the race and color of accused "in compliance with the Articles of the Constitution of this State and the jury laws in conformity therewith." That the commissioners excluded from jury service, citizens of the race and color of accused; that Act 170 of 1894, the jury law, is unconstitutional because it had omitted the compliance clause before referred to; that the commissioners illegally confined their summons and qualification for jury service to white citizens only and there is no State statute to punish them for their illegal discrimination; that the State Court had denied to him the benefits of the provisions of the Constitution of the State guaranteeing equal rights to all citizens of the United States, by having his challenge to the array filed " subject to argument on face of papers," by refusing to issue the *subpœnas duces tecum* asked for, and the Court had thereby deprived him of due process of law and compulsory process to obtain witnesses in his favor in violation of Articles 6 and 8 of the State Constitution, and denied to him the equal protection of the law in violation of the 14th amendment; that the man said to have been murdered was a white man, and the local prejudice against him, based solely upon the fact that he is a colored man, and without regard to the

merits of the case, and on account of prejudicial publications in certain newspapers, he could not have the full equal benefit of all laws and proceedings in the State Courts, as enjoyed by white citizens, and that he had less chance of enforcing in the State Courts all his rights as a citizen of the United States and there was a probability of a denial to him of his said rights on every trial which might take place upon this indictment in the State Courts.

On February 22nd counsel for accused wrote to the Judge, on receipt of notice that the trial had been fixed for February 28th, to notify the Judge that he was "about to apply to the Circuit Court of the United States for the Circuit and District of Louisiana, for a writ of prohibition, *certiorari*, and *habeas corpus cum causa*," explaining that under his interpretation of Section 641 of the Revised Statutes of the United States, after filing the petition for removal, by operation of law the Federal Court is vested with jurisdiction of the case.

On February 28th the trial was begun, and on March 1st the jury rendered a verdict of "guilty."

On March 7th counsel for accused filed a motion for a new trial, claiming that the verdict was contrary to the law and evidence, that the accused did not have a fair and impartial trial, and that he did not have the benefit of such a fair and impartial trial as intended by the 14th amendment to the Constitution of the United States, and his civil rights thereunder, in this, that the venire that formed the tales jurors out of which he was forced to select the petit jurors that tried him,

were all white men, although there were about six thousand colored citizens having the qualifications prescribed by the Constitution and laws of the State, being almost 17 per cent. of the registered vote of the Parish, and several other grounds based upon complaints of occurrences which took place during the trial and over which this Court has no jurisdiction. As the trial was had before regular jurors, and no tales jurors were drawn, this was a mistake.

On the same day, March 7th, accused filed a motion in arrest of judgment claiming that the death sentence could not be imposed upon him, because he had filed his petition for removal under Section 641 of the Revised Statutes of the United States, and had subsequently filed and had it docketed in the United States Court in conformity with that Section, and that this Court had been thereby divested of jurisdiction. A certified copy of the petition to the United States Court was annexed and made part of the motion. The petition to the United States Circuit Court, R. 43, set forth that he had filed a petition for removal in the State Court, stating its contents; that the jury commissioners had violated the 14th amendment by failing to summon colored men before them to qualify for jury service; that they had thereby excluded colored men from the jury service although possessed of all legal qualifications required under the Constitution and laws of the State, as well as the Constitution of the United States; that the commissioners confined their summons and qualifications to white citizens only, and that there was no State law to punish them for

this illegal discrimination; that Act 170 of 1894, under which the grand jury was impanelled, is unconstitutional, because it "has omitted the compliance clause of the 14th amendment;" that the equal rights guaranteed by the Constitution of the State to all citizens of the United States had been denied to him by the State Court, in having his challenge to the array filed "subject to argument on face of papers," by refusing to issue the *subpoenas duces tecum* prayed for, and the State Court had thereby deprived him of due process of law and compulsory process to obtain witnesses in violation of the Article of the Constitution of the State, and denied to him the equal protection of the law in violation of the 14th amendment; that there was prejudice against accused which would prevent a fair trial in the State Court; that he had asked the Judge of the State Court to fix a day for the argument of his petition for removal and allow him an opportunity to summon witnesses, but the Judge would not entertain his request; that he was forced to join issue with the State on his plea of not guilty; that the Judge of the State Court was the agent of the State, and his act was the act of the State depriving accused of his right to due process of law and denying to him equal protection of the law in violation of the 14th amendment and his civil rights thereunder; that he had applied to the State Court for the necessary copies of pleadings which were annexed to and made part of the petition; and that the filing of his petition for removal had divested the State Court of jurisdiction. He therefore prayed that he be allowed to file the petition,

that the clerk issue to the Marshal a writ of *habeas corpus cum causa*, ordering and commanding him to take into his custody the body of petitioner to be dealt with in that Court according to law, and that a writ of *certiorari* and prohibition issue to the Judge and District Attorney enjoining further proceedings in the State Court. This petition was sworn to, and, on the necessary oath, the Federal Judge allowed the petition to be filed without the deposit or security for costs; but no further orders appear to have been issued, and no further proceedings taken in that matter. It is presumed that the Federal Judge declined to order the *habeas corpus cum causa, certiorari* or prohibition.

On the same day the motion for new trial and motion in arrest were refused, and accused sentenced to death. On the 11th an appeal was taken to the Supreme Court. On March 14th five bills of exception were filed and signed. Bill A was taken to the overruling of the petition for removal, which accused alleged to be a deprivation of due process of law, and of his civil rights and equal rights under the law, and the violation of his civil rights under the 14th amendment. Bill B was taken to the refusal of a new trial. The only statement in the bill which can possibly be contended to give this Court jurisdiction is, perhaps, that "the Court erred in not fixing a day to hear witnesses on the allegations set forth for a new trial, thereby depriving accused of his right of process of law and his Constitutional rights thereunder, as well as his equal and civil rights under the Federal Con-

stitution." What is claimed to be Bill C, but which the Court held not to be a bill and refused to sign as a bill, and which is not a bill of exceptions in form, is a memorandum to the effect that the Court erred in not quashing the indictment; that the Legislature had stamped Act 170 of 1894 as a special or local law, and the admission of the District Attorney that it had not been published in the French language as provided by law, rendered the Act unconstitutional; that the Court erred in declaring the Act constitutional in opposition to the reasons assigned in the assignments and bills of exception filed in the Heard case; that the Court erred in not declaring Act 170 of 1894 unconstitutional because the absence of the compliance clause to the 14th amendment. The Judge further declared that no bill was reserved by accused or his counsel to his refusal to quash the indictment, and for this additional reason he refused to sign this document as a bill, and because the document presented was not a bill of exception. Bill of exception D was taken to the admission of certain evidence, and does not claim to present any Federal question. Bill of exception E was taken to the overruling of the motion in arrest. Aside from the questions presented in the petition for removal, annexed to and made part of the motion in arrest, the trial Judge properly states that a motion in arrest can be made only for errors patent on the face of the record, that while the petition is made part of this record by being attached to and made part of the motion in arrest, it is not on the face of this record essential in this proceeding and therefore cannot be

considered. The Judge further states that the application was for a prohibition *certiorari* and *habeas corpus cum causa*, as indicated by counsel's letter, made part of the bill, and the Circuit Court of the United States evidently refused to take cognizance of the case, as no restraining order was ever issued. These bills were presented three days after appeal, and, under the rules of the Court, they came too late, but the Judge signed them on account of the issue of life and death involved.

In the State Supreme Court, plaintiff in error, then appellant, filed an assignment of errors (R. 53), complaining 1st, of the "endorsement of the trial Court on challenge to grand jury, "filed subject to argument on face of papers," etc.; 2d and 3d, endorsements on motions for *subpœna duces tecum*, "filed subject to orders;" 4th, the extract from the minutes of the trial Court of February 5th, 1895, to the effect that counsel must produce proof without expecting to produce same through the Court; 5th, compelling accused to swear to an affidavit as to the necessity and materiality for the *subpœnas duces tecum* on the registrar of voters and jury commissioners; 6th, overruling motion to quash indictment; 7th, overruling his application for the removal of the cause to the Federal Court; 8th, proceeding with the trial after accused had notified the Judge of his intention to apply to the Federal Court for a writ of *habeas corpus cum causa*, etc.; 9th, overruling his motion for a new trial; and, 10th, overruling his motion in arrest of judgment, charging under each head that each of the alleged errors was "an

attempt by the trial Court to change the forms of law and criminal procedure and arbitrary ruling and a denial of justice and due process of law, in violation of the rights of the accused, guaranteed by the Constitution of Louisiana and the 14th amendment to the Constitution of the United States, and his civil and equal rights thereunder."

After due argument and submission the State Supreme Court, on June 3d, 1895, rendered its opinion affirming the judgment of the lower court. An application for rehearing was filed on the 7th and refused on the 17th of June. Counsel then applied to the State Supreme Court for a writ of error, which was refused; and he then applied to this Court, and it was granted.

He has filed an assignment of errors in this Court setting forth the same ten complaints embraced in the assignment of errors filed in the State Supreme Court in substantially the same language, and covering a further complaint, numbered "Eleventh," that Act 170 of 1894, the jury law, is unconstitutional, because it confers judicial powers on jury commissioners in the selection and qualification of citizens for jury service, which he says is in violation of the rights guaranteed to accused by the Constitution of Louisiana and the 14th amendment and his civil and equal rights thereunder.

BRIEF.

We have made an elaborate statement of the proceedings, in their chronological order, in order that each complaint can be viewed as made, and yet that we might be able to discuss the questions involved without getting into the same confusion which appears to have troubled counsel for accused in making his most zealous and elaborate defense.

There are many questions raised by counsel involving details of practice before the Criminal Court, which do not come before this Court for review; and we think that his continually repeated complaints that every little ruling of the trial court deprived him of due process of law, equal rights under the law, etc., are too transparent, as seeking to invest this Court with a fictitious jurisdiction, to encourage any hope of success.

Plaintiff in error was not entitled to any greater rights, or to any other process, or to any process upon any other conditions, than are accorded to other litigants under similar circumstances. If he was allowed the same time for preparation, the same opportunity to produce his evidence and to make his argument, and had the issues presented by him passed upon and judicially determined in the same manner, and enjoyed the same rights as others who have been brought before the court, under the law and practice prevailing in the State, his complaints are utterly without foundation, as to equal rights, due process, etc.

By the 14th amendment the Federal government only undertook to guarantee to him the same rights as are enjoyed by white men, and not other or greater rights.

Article 6 of the State Constitution provides, that no person shall be deprived of life, liberty or property without due process of law; but plaintiff in error cannot claim exemption from the same process of law which operates upon all other citizens of the State. Article 8 of the Constitution provides that the accused shall have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel in defending himself; and he is entitled to this and nothing more. He is not entitled to compulsory process intended, nor to obtain witnesses in his favor, nor to procure evidence material to his defense, but simply to get information for speculative purposes.

Section 992 of the Revised Statutes of Louisiana provides for the enjoyment by all accused persons of these same rights, privileges and advantages. Each and all are intended only to guarantee legal rights, the use of legal process; and none of them place it in the power of counsel to compel the court to do something entirely outside of the law and contrary to all precedent. However, in order to set the Court right and to satisfy your Honors that the trial judge was really very indulgent towards accused and his counsel, and, instead of depriving them of any rights, tried to aid them in getting their case before the Court, we will notice some of these complaints in passing.

All the issues raised in this case, both those presenting Federal questions, and those involving mere details of practice, are repeated so often and in so many different forms, that we will try to discuss each question only once, although it may be involved in a challenge, a motion, a bill of exceptions, petition for removal, notice of application to the Federal Court, motion for new trial, motion in arrest, and two assignments of error.

Plaintiff in error complains of the endorsement upon his challenge to the grand jury "filed subject to argument on face of papers, etc," and to the endorsements upon the two motions for *subpœna ducus tecum*, 'filed subject to orders." The Court will observe that these words are not taken from the minutes of the Court, or any written order of the Court, but they are in fact pencil memoranda made by the minute clerk, really not by direction of the Court, but from his understanding as to what passed between court and counsel when these documents were filed, all three having been presented together. This challenge to the grand jury was filed January 10th, 1895. The venire from which the grand jury was selected was drawn in September, 1894; the grand jury was selected, impanelled, sworn and charged on the first Monday in October to serve for three months, in accordance with the provisions of Section 3 of Act 98 of 1880, page 125; it had served during the months of October, November and December, had been discharged, and it had passed out of existence.

Act 170 of 1894, provides, that no challenge can be made to the venire or other pleading attacking the legality or regularity of the drawing of the jury, unless presented within the first three judicial days of the month or term it is organized.

As a matter of course it was too late to challenge that grand jury, or the venire or array from which it was selected, and the Court could have well refused to receive the challenge or allow it to be filed. It seems perfectly clear to us that a motion to quash the indictment, upon this and every other ground counsel chose to set up, was his only remedy, although such a motion would not have been good. Possibly, the Judge, realizing this and realizing that the District Attorney might urge valid objections to the paper as a challenge to the venire or the grand jury which had finished its labors and ceased to exist, may have made remarks to counsel which impressed the minute clerk with the idea that the document was only filed conditionally. It may be that the remarks of the Judge were made exclusively with reference to the two motions for *subpœna duces tecum*, but understood by the clerk as applying to the challenge to the grand jury. At any rate, whether this endorsement was made by order of the court or through misunderstanding of the clerk, and whether it was right or wrong, it did accused no harm, because the challenge was not argued on the face of the papers, it was not treated as conditionally filed, and it was regularly tried and disposed of; and the Judge treated counsel with great

indulgence in allowing this paper to pass as a motion to quash the indictment, and then allow him to file another on other grounds.

It is perfectly clear that the filing of the motions for *subpœnas duces tecum* with the endorsement "filed subject to orders," was no hardship upon the accused. The Court will observe that the motions do not call for any books, papers or documents in the hands of the registrar or the commissioners, in shape to be used as evidence and calculated to aid accused in the trial of the challenge to the grand jury, but they call for certain information from the registrar and commissioners, or call upon them to do certain work, in order to furnish certain information the accused desired. When these documents were filed the court called counsel's attention to this defect in them, advised him to specifically describe what he wanted, and assured him he would then grant the orders; but counsel insisted upon filing the motions in the shape presented, saying he would reserve a bill if refused, and the court allowed the motions to be filed without granting the orders, but promising to grant them if counsel could convince him they were proper. To carry out this idea the minute clerk made the endorsements on the motions.

Counsel complains of an extract from the minutes of the court of February 5th, 1895, on the resumption of the trial of the challenge to the grand jury, indicating that counsel must produce his proof without resorting to the process of the court. The awkward wording of this minute entry would indicate

that there was some mistake about it; but it is entirely inconsistent with the action of the court, and goes far beyond any ruling which it was necessary for the court to make upon the pending application. The application was for the issuance of these two *subpœnas duces tecum*. The only question was whether the court could issue the *subpœnas duces tecum* for the purpose named.

The bill of exceptions, and particularly the Judge's addenda thereto, R. 29, shows that the *subpœna duces tecum* was refused, not because the court was not willing to issue the process to aid accused in getting his evidence, but because the motion was defective in not describing or referring to any paper or document which the defendant required; and the court distinctly says that the books or documents required by defendant should have been specified (it evidently followed that the writ would have been issued if the books and documents had been specified), "or the information sought could have been obtained from the Registrar of Voters by a writ of *subpœna ad testificandum*." This meant, of course, that accused could have summoned the Registrar as a witness, and negatived all idea of any desire to deprive him of any process of court to obtain evidence. Substantially the same thing was recited by the judge in bill No. 2, R. 30, also manifesting the disposition to issue any process of court which the court thought appropriate, and manifesting no desire to deprive accused of any legal right. The minutes of the trial before the jury show

that accused had a number of witnesses in his defense, and he could have got them when necessary at any stage of the case.

The reasons assigned by the judge for declining to issue the *subpœnas duces tecum* to the Registrar of Voters and the Jury Commissioners, stated in the bills of exception 1 and 2, R. 29 and 30, are correct and sufficient. In his brief filed in the State Supreme Court counsel cited Articles 473, 474 and 475 of the Code of Practice of Louisiana to sustain his contention that he was entitled to the *subpœnas* applied for. While the Code of Practice has no reference to criminal proceedings, the practice is the same, whether such a writ is desired in a criminal or civil case. Article 473 of the Code of Practice provides that if one of the parties wish to obtain books, papers, or other documents in possession of the adverse party, the court shall order, on motion of the party applying for the same, that such books, papers or documents be brought into court, and produced on the day fixed for the trial of the cause. The order must describe such books, papers, or documents. Article 474 provides that the same rule shall govern where a third person, not a party to the suit, has in his possession any act, paper, document, or book, material to the cause, which one of the parties wishes to have brought into court. Article 475 has somewhat similar provisions. It will be seen that such an order, which certainly is a *subpœna duces tecum* under Article 474 where a third person is involved, which was the case here, will issue only in case some acts, papers, documents or books are

sought to be obtained; that such an order when issued must describe the books, papers or documents wanted; and the books, papers, or documents wanted must be material to the cause.

In his brief before the State Supreme Court counsel cited 3 Dill. (U. S.), 566, 570, to the effect that the papers are required to be stated and specified only with that degree of certainty which is practicable under the circumstances, so that the witness may be able to know what is wanted of him. We do not gainsay that authority; but in this case there was no book, paper, document or act called for, or specified in any manner. Such a writ goes out only to bring into Court some book, document or paper which is in existence, in the possession of the witness, and in shape to be used in evidence in a pending cause; but in this case there was no pretence that accused sought to procure the production of any particular book, document or paper. He sought to compel certain parties to furnish him information, to compel the registrar of voters to go over his books and compile and furnish certain statistics, to do work which the registrar said would take him sixty or ninty days, even if he had the clerical force, which he did not have. Counsel sought to compel the jury commissioners to make a list, giving names and residences, of all persons examined in qualifying them for jury service, thirty-five hundred in number, and to make out and furnish a list of the one thousand names put in the wheel.

If counsel had applied for an order to require the registrar of voters to produce the books of registra-

tion, or any book, paper or document in his office, doubtless the order would have been granted. If counsel wanted to prove the things embraced in the information called for by him, Section 5 of Act 123 of 1880, page 149, would show him that what he wanted was the precinct register. This is a book which the law requires the registrar to keep in his office, and to keep it in such a manner as to furnish the information counsel wanted. Section 4 requires the registrar to keep one precinct register for each precinct, and specifies the other books which he shall keep. If counsel had wanted to prove anything by these books he could have had them produced. The law covers such a request and the judge would have had no difficulty in ordering the production of the books specified.

As there is no list kept of citizens summoned before the jury commissioners and examined by them in filling the wheel, it was impossible for any one to furnish or make that list. On the trial of a similar challenge in the Heard case, the Judge of Section A declined to have produced the list of one thousand names put in the wheel, because it could not possibly aid accused, as it did not indicate the color of the jurors. To prevent tampering with juries, the law and the rules of the court require the names to be kept secret, and the Judge would be justified in producing the list only when necessary to promote the ends of justice. When this case was tried that jury had passed out of existence, and there was no occasion for secrecy, and the Judge would have ordered the list produced, if asked for, and if in existence, but it was not.

But it would have done no good to produce this list, because it would not have furnished any evidence, material or otherwise. This writ is to be used only to procure evidence material to the cause. Act 170 of 1894, as well as Act 98 of 1880, the regular jury law, does not require the commissioners to specify the color of the juror, either on the list or slips put in the wheel. They would only furnish the name and residence. We take it that a *subpœna duces tecum* can only be resorted to under the law to procure evidence, and not to procure a list of witnesses. It is not a writ of inquiry, which counsel sought to make it in this case. So, if counsel had called for the production of the list or slips in the jury wheel, which he did not, the court could have refused the order to produce, because it is perfectly evident that it could not have served accused any good purpose, or furnished any evidence to sustain his challenge to the grand jury. The law cited and the evidence in this case both show that there is nothing on the list or slips to indicate the color of the party named, and therefore neither could have been of use to accused.

Besides, at the time counsel filed his motion for *subpœna duces tecum* in January, 1895, the list of names put in the wheel in September, 1894, was not in existence. Other names had been added to the wheel and drawings made therefrom each month, say four or five different times, for each section of the criminal court, to constitute their respective juries during each month which had elapsed since September, 1894, and to supply juries needed in the Civil District Court all that

time. The jury list is only for temporary use during the time of its existence, and is not preserved. As these lists are kept alphabetically in a book, the names which were put in the wheel in September, 1894, are doubtless on that *book*, although erased by a line ruled through them; but there would be no way to ascertain the exact names entered on that book from the drawing of September, 1894. It could be done if all the names were put down on one straight list; but they are entered in a big book under the head of the different letters of the alphabet, and there is nothing to indicate which names under any given letter were drawn in any given month. It would be impracticable to keep the list any other way. The law provides that there shall be not less than one thousand names in the wheel. As a matter of fact over eleven hundred names were put in the wheel in September, and since then a drawing has been made each month for each section of the Criminal District Court, and as often as required for the Civil District Court, and names and slips have been added from time to time to take the place of those drawn out. Therefore, it is perfectly apparent that counsel was not only seeking to obtain information which was not material to his defence, but which was not actually in existence.

Instead of calling for the books in the Registrar's possession, counsel preferred to compel the Registrar to furnish the information he wanted and avoid the labor and expense of going through a large number of books to get it. He assumed that Section 43 of Act 123 of 1880, page 167, required the Registrar to

forward to the Secretary of State a report after each congressional election, that would contain the information he wanted. Then, instead of applying for a *subpœna duces tecum* on the Secretary of State to produce this report which the Registrar had forwarded to him, he either assumed that the Registrar had kept a duplicate of that report, or wished to make him do the work over again. He did not call upon the Registrar to produce that report, or a duplicate of that report, but he called upon him to furnish the information, and contended that because Section 43 required him to make such a report to the Secretary of State, he was bound to have that information in his office and to furnish it to him. Of course, the Registrar had the information in his office, scattered in a great mass of books making up the records of his office, and it could be obtained, collated and tabulated, by going through several hundred precinct books; but this work had not been done after the congressional election of 1894, and the Registrar was unable to furnish the exact information counsel wanted, and in the exact shape he demanded.

It is no concern of accused or his counsel whether the Registrar properly discharges his duty under the law or not. If the Registrar has not got the information or document wanted as evidence in this case, that ends the matter. Considering the last clause of Section 43, which requires the Secretary of State to furnish the legislature with a tabulated statement of the Registrars' reports, it being the duty of each of the fifty-eight Registrars in the State to make similar re-

ports to the Secretary of State, the Assessors in the country Parishes being the Registrars, and considering that it was only during the general State elections that the appropriations commanded a sufficient clerical force to do the work, the Registrar thought, and the Attorney General advised him, that this law only contemplated that this report should be made immediately after the State election, in order that the Secretary of State might furnish it to the Legislature, and he had not prepared and made the report to the Secretary of State. Therefore the Registrar could not have furnished the information which counsel insisted upon, even if the *subpœna* had been issued to him.

The Judge knew that the Registrar could not furnish the information exactly as demanded by counsel; that a similar writ had been issued to the Registrar by the Judge of Section A of the Criminal Court, at the instance of this same counsel in the case of State vs. Heard; and that the Registrar had made a return to that *subpœna duces tecum* explaining why he could not furnish the exact information called for, but furnished similar information regarding the conditions existing in 1892, giving a compiled statement of registered voters of the City of New Orleans, showing the number of white native born who sign and who make their mark, the number of white foreign born who sign and who make their mark, and the number of colored who sign and who make their mark. This is the very return and compiled statement which counsel for accused filed in evidence on the trial of the challenge

to the grand jury in this case. All these reasons furnish ample justification for the Judge's refusal to issue this *subpœna duces tecum;* but presuming that there is no material difference in the registered vote of this city in 1892 and 1894, counsel had practically the very information he sought. Besides, there is filed in evidence in this case an admission made by the District Attorney in the Heard case, R 5, as to the proportion between colored and white voters, and the proportion of colored voters who can write their names. There is therefore nothing in this complaint.

The 5th assignment of errors complains that the Court made accused swear to "the necessity and materiality" of a *subpœna duces tecum* to the Registrar and Commissioners. There is such an affidavit on page 28 of the record, disconnected with either motion to which it refers; but there is nothing to show that the Judge compelled him to make this affidavit, and, if he did, nothing to show that it caused any injury to accused. If the Judge required that affidavit, he may have considered it necessary or desirable, as it is certainly proper and customary, in the practice before the Criminal Courts. All motions and pleadings filed in this Court are sworn to.

The motion to quash the indictment, R. 31, is based on the charge that "Act 170 of 1894, under the provisions of which the grand jury who indicted accused was organized and impanelled, is unconstitutional, null and void, because it was a special or local law and did not conform with Articles 48 and 154 of the Constitution of this State and the Acts of the

Legislature in conformity therewith, as well as the jurisprudence of the Supreme Court on this matter, and because it did "not contain the compliance clause of the 13th, 14th and 15th amendments to the Federal Constitution, provided for by all jury laws of this State, providing that there shall be no discrimination on account of race, color or previous condition of servitude."

Article 48 of the Constitution requires publication of notice of intention to apply for the passage of a local or special law, in the same manner provided by law for the advertisement of judicial sales. Article 154 of the Constitution empowers the legislature to prescribe that judicial advertisements in certain designated cities and parishes shall be made in the French language; we presume that "the act of the legislature in conformity therewith." referred to in the motion to quash, means Act 38 of 1880 which provided for the advertisement of judical sales in French in the City of New Orleans. We therefore understand that the defect alleged by accused to be in this act, consists of the failure to advertise the intention to apply for it in the French language.

On the trial of the motion to quash, the District Attorney, it appears, admitted that publication was not made in French in any newspaper; but the Supreme Court has decided in this very case, as well as in others, that the recital in the act that the publication had been duly made, which the Court will see on page 211, Acts of 1894, is conclusive of that publication. But, of far more importance than this, the

Court decided in this case that this was not a special law and did not need any advertisement. In the case of State vs. Dalon. 35 A. 1141, the State Supreme Court decided that Act 98 of 1880, to which this act is a mere amendment, was not a local or special law, and was valid without any advertisement of intention to apply for its passage, under Article 48 of the Constitution. An Act affecting the administration of justice, the organization of courts or juries for that purpose, manifestly affects the entire community, the general public, residents and visitors, is in the highest sense a public law, and cannot possibly be termed a local or special law. This is the interpretation which has been given by the Supreme Court of the State to Article 48, and under a well settled principle that construction will be followed by this Court.

Accused complains in his seventh assignment of errors that the trial court overruled his application for removal of the cause to the United States Circuit Court, without giving him an opportunity to summon witnesses, and without hearing the law and the evidence on the application, thereby depriving him of due process of law, etc. There is nothing in the minutes or the record to show that counsel was refused an opportunity to summon witnesses, or to produce proof, or to make an argument. Nothing of the kind is intimated in bill of exceptions A. R. 48. The bill indicates that counsel excepted to the overruling of his application, only on the ground that it deprived him of due process of law and his civil rights under the law and the 14th Amendment. As the challenge

to the grand jury or to the venire, based on the same grounds as the application for removal, had been tried and overruled a few weeks before, we hardly presume counsel would have any evidence to offer and not much argument to make; and we feel sure that the judge would not have refused reasonable time for either, if asked. There is nothing in the bill or the minutes to sustain any such complaint.

The application for removal was properly overruled. The petition for removal showed explicitly that instead of any rights being denied to accused, or any provisions of the Federal Constitution or law being defied by the political power of the State, as manifested through its constitution and laws, that the constitution and laws had thrown every safeguard around the rights of the accused and adopted every measure calculated to respect and carry out the 14th Amendment. In Rives vs. Virginia, 100 U. S. 313, it was decided that a petition for removal in a case similar to this did not present a case under Section 641 of the Revised Statutes of the United States, because the constitution and laws of Virginia did not exclude colored citizens from service on juries. In Neal vs. Delaware, 103 U. S. 370, this Court held the same thing, although the constitution of Delaware, adopted many years before, did disqualify negroes, because the Court held that the subsequent adoption of the 14th Amendment rendered inoperative that provision of the Delaware Constitution, and Delaware had not passed any such law since the adoption of the 14th Amendment.

There is no pretence in any of the numerous motions, petitions, and assignments of error in this case, that the law-making power of Louisiana, had in any enactment, organic or legislative, sought to disqualify colored men from serving on juries. On the other hand, Act 170 of 1894, p. 212, provides that "the said Commissioners shall select at large, impartially, from the citizens of the Parish of Orleans, having the qualifications requisite to register as voters, the names of no less than one thousand persons competent under this act to serve as jurors." Article 185 of the Constitution provides that every male citizen of the United States who is twenty-one years old or upwards, possessing certain qualifications, shall be an elector and shall be entitled to vote at any election by the people. Article 187 provides that certain classes of convicts, idiots, and insane persons shall not vote. Article 188 provides that "no qualification of any kind for suffrage or office, nor any restraint upon the same, on account of race, color or previous condition shall be made by law."

We thus see that the right of suffrage is guaranteed by the Constitution to the colored men as well as to the white, and no attempt has ever been made to violate the prohibitory provisions of Article 188. As the law requires that jurors be selected impartially, from all persons having the right to registrar as voters, we think that this mandatory provision and express direction as to impartiality, considered with reference to the constitutional provisions cited, is a

most ample compliance clause with the 14th amendment so frequently referred to by counsel for accused.

Counsel complains in his 8th assignment of errors of the proceeding with the trial by the court after notification by letter from counsel of date February 22nd, 1895, that he intended to apply to the United States Court for a writ of *habeas corpus cum causa*, *certiorari* and prohibition under the provisions of section 641 of the Revised Statutes of the United States.

The Court will observe that this was a mere notice of intention to apply to the Federal Court; and that the trial did not take place until six days after this notice was sent, and in the meantime no action was taken by the Federal Court. This was a case where the accused was in actual custody of the State Court, being confined in the Parish Prison on a charge of murder, and Section 642 provides, that in such a case it is the duty of the clerk to issue a writ of *habeas corpus cum causa*, and of the marshal to take charge of the accused under the writ. In his letter to the Judge of the State Court counsel declared his intention to do this very thing, as well as to apply for writs of *certiorari* and prohibition. The law contemplates a removal, a transfer from one court to another, not the suspension of the prosecution in one court without taking it up in the other.

If the mere notice to the Judge of the State Court that the accused intends to apply to the Federal Court for removal divests the jurisdiction of the State Court, such notices would be given by a great many criminals who would not apply to the Federal Court

at all. Until a long time afterwards the judge in this case did not know but that this accused had adopted that course. As, however, the petition was filed in the Federal Court and the Federal Judge took no action, it is evident that he took the same view of the case that the Judge of the State Court did, and as your Honors have held in the two cases cited, that there was no showing made for removal.

Counsel complains that the Court did not give him an opportunity to summon witnesses to prove certain grounds alleged for a new trial, such as the alleged misconduct of the jury, etc., over which this Court has no jurisdiction; but still counsel assigns it as error herein. The 9th assignment of errors does not disclose the particular points upon which witnesses were wanted, but the bill of exceptions, R. 49, shows that they were upon grounds not before this Court for review, as they do not involve any Federal question. The only ground for a new trial involving any Federal question is the same one about the exclusion of negroes from jury service which is more fully presented in the challenge to the grand jury. All the others are mere questions of practice under the law and jurisprudence of the State.

If by "the venire that formed the tales jurors," in the motion for new trial, R. 40, accused meant to attack the venire from which the trial jury was selected, his attack came too late. Act 170 of 1894 requires that all attacks upon the legality of the venire or the regularity of its drawing must be filed within the first three judicial days of the term or month for which

the jury is organized. The same law will show that the jury is drawn for the month. Accused was tried before the jury drawn for February, 1894. On the 29th day of that month he went to trial before a jury of his own selection, up to that time never having made any complaint against the venire or the manner of its drawing. After having thus allowed the delay fixed by law to pass, and at the end of the month having taken his chances of acquittal before this jury without objection, surely he cannot he heard, after conviction, in a motion for new trial, for the first time to make objection to the jury. It came too late. Besides he only complains that no negroes were on the venire, not that negroes were excluded from jury service; and the 14th amendment does not guarantee him a negro jury.

The motion in arrest of judgment is based exclusively on the petition for removal, on the contention that the filing of the petition in the Federal Court had deprived the State Court of jurisdiction. As the same grounds set forth in the petition for removal are set up in the challenge to the grand jury, if they are good it is a matter of little consequence if the motion in arrest is bad. The filing of the petition may have furnished grounds for writs of *certiorari* and prohibition, *habeas corpus cum causa*, or others, but surely not for a motion in arrest of judgment. It needs no citation of authority to sustain the position that a motion in arrest of judgment can only be based upon a defect patent upon the face of the record; and it needs no argument to convince this Court that the

annexing of a document to a motion in arrest when filing it does not make it a part of the record, and its filing would have been unnecessary if there had been any defect apparent on the face of the record. We therefore hold that this motion in arrest is entirely without any merit, independent of the merits of the questions raised in the petition to the Federal Court, a copy of which is annexed to the motion in arrest.

The eleventh assignment of errors sets up that Act 170 of 1894 is unconstitutional, because it confers judicial powers upon the jury commissioners. As that is not a Federal question and was not raised in the Court below, it cannot be passed upon here, and the complaint entirely fails to point out any constitutional provision which would prevent the legislature from conferring judicial power upon such commissioners, however many such might be found in the Constitution. But it was thoroughly settled by the majority of this Court in *ex parte* Virginia, 100 U. S. 339, that the act of selecting jurors is ministerial, and not judicial. We fail to see where this act confers any judicial power. All the jury laws under the present and preceding Constitutions, conferred a certain amount of discretion upon the commissioners or officers charged with the duty of selecting jurors.

But, whatever be the nature of the powers exercised by the jury commissioners, they are fully covered by Article 116 of the Constitution which required the legislature to "provide by general law for the selection of competent and intelligent jurors who shall have capacity to serve as grand jurors and try and deter-

mine both criminal and civil cases." In obedience to this constitutional mandate the legislature has passed Act 98 of 1880 and Act 170 of 1894 for the city, and other and similar laws for the country parishes. In obedience to this constitutional mandate the legislature has necessarily conferred upon the jury commissioners the discretion and power necessary for the selection of competent and intelligent jurors who shall have the required capacity fixed in the constitution itself.

As counsel has embraced in his assignments of error every issue involved in the case, in whatever form originally presented, and in whatever variety of forms subsequently embodied, except the questions raised in the challenge to the venire, or challenge to the grand jury as he usually calls it, it might be presumed that he has abandoned that challenge and the issues therein presented. As it is not pretended that any member of that grand jury was incompetent, and as an indictment is but an accusation, all complaints against its fairness are considered waived by the failure to challenge the venire from which the trial jury was selected for the same general cause; and if the trial jury was fair and legal the composition of the grand jury is of little importance, if competent, and the competency of this grand jury is not questioned. But, for safety, we will consider the questions raised in the challenge. It charges that, in qualifying and selecting the citizens as jurors, the Jury Commissioners did not comply with the law, but violated Articles 116 and 188 of the State Constitution, and

the 13th, 14th, and 15th Amendments to the Constitution of the United States. The proof entirely fails to sustain him in any particular, and establishes the contrary.

Article 116 of the State Constitution makes it the duty of the Legislature to provide by law for the for the selection of competent and intelligent jurors. We hardly see how Jury Commissioners could be said to have violated this article; but we do not understand that they are charged with any failure to make proper efforts to select competent and intelligent jurors. The only complaint is that, in making selections, they discriminated against colored citizens on account of their color. This will not be said, even by counsel for plaintiff in error, to indicate a lack of effort to select competent and intelligent jurors. We take it that the enumeration of Article 116 and the 13th and 15th Amendments was a mistake; and that it is only claimed that the State law, Act 170 of 1894, was not complied with, and that this failure was in violation of the 14th Amendment and Article 188 of the State Constitution.

Act 170 of 1894 makes it the duty of the Jury Commissioners to select the jurors impartially from among all citizens entitled to register as voters; and Article 188 of the Constitution prohibits any qualification or restriction upon suffrage on account of race or color. Therefore, if the commissioners excluded negroes from jury service on account of their color, they did so in violation of the constitution and laws of the State. This would present no federal question,

except to show that this was not a proper case for removal. However much we might differ on this question from the majority of this Court, it is now settled that exclusion from jury service on account of color is a violation of the 14th Amendment; and if this record satisfies your Honors that plaintiff in error has proven his charges against the jury commissioners in this case, relief will be granted him. Otherwise the judgment of the State courts will not be disturbed.

We feel satisfied that the record in this case shows that counsel for accused has made this elaborate fight, without a scintilla of evidence to sustain his contention; and that he had no information that justified even a suspicion that his charge had any foundation in fact. In 42 A. 255, the State Supreme Court said: "In civil matters all distinctions on account of race, color or previous conditions of servitude have been abolished;" and as a matter of fact there is no discrimination in our State courts against colored citizens, on account of their race or color. There is a general tendency throughout the country to secure better juries, in the effort to remedy the evils resulting from a failure to enforce the law; and the success of plaintiff in error in this case would be a serious blow to justice, fairly and intelligently administered by just and competent jurors. There is no exclusion of colored citizens from jury service, on account of color; but the State has a right to adopt any just measure to secure the services of competent and intelligent jurors, and every well informed man knows that the proportion of men suited to such service is larger among

white men than among colored men. The better and more intelligent class of colored citizens are selected as jurors, and encouraged to serve and in every way to fit themselves for the duties of citizenship; and the comparatively few colored men now on our juries is no evidence of exclusion on account of color.

Officers of the law are always presumed to do their duty, and in this case the jury commissioners are presumed to have selected persons to serve on the jury without discrimination on account of color, in obedience to the Constitution and laws, Federal and State; and plaintiff in error by filing his challenge assumed the burden of proof to establish the contrary. From the fact that the District Attorney offered in evidence on the trial of the challenge to the venire in this case the evidence taken on the trial of a similar challenge in the case of State vs. Heard, and as counsel for accused at the same time filed in evidence other parts of that record, each making no objection to what the other did, and also from the way the minutes were made up of that particular proceeding, it is apparent that they had mutually adopted the plan of submitting the question in this case upon the evidence taken in that, except the evidence adduced from one of the jury commissioners who was placed upon the stand by accused.

An examination of that evidence will show that there is nothing in it upon which counsel could hang a hope for success, except that the deputy sheriffs could not remember any colored man upon whom they made personal service of summons to appear before

the commissioners, and that the commissioners could not give the names of any colored man they had selected to serve on the jury. But your Honors will observe that the commissioners could not give the name of any white man either, and it would be preposterous to expect them to remember the names, or any name, put in the jury wheel months before. These names are selected with respect to general qualifications, not with respect to individuals, and naturally would not impress themselves upon their memory.

The testimony of the jury commissioners, R. 12 to 16, shows that they did not discriminate against colored men on account of color; that they did not exclude colored men from service on the jury, on account of their color; that they did select colored men for service on juries; that, at least, two colored men were on the venire from which this very grand jury was selected in October, 1894. Deputy Sheriff Peter Lemm, R. 9, swears that he served one attachment upon a colored juror at the October term of Court, 1894; Deputy Boya swears there were some colored jurors on the October venire; and his examination, R. 11 and 12, shows there were several before the two sections of the court. Jury Commissioners Chevalley (R. 13) and Mĕlancon (R. 15) swear that there were two colored jurors on that venire. This is the very venire which Plaintiff in Error challenged, and from which the Grand Jury was drawn which indicted him. This was not at all necessary to make the grand jury and its findings valid, but it shows how utterly groundless are the charges of unjust discrimination on account of race or color.

Besides all this evidence, the Judge states, in bill of exceptions A. R. 48, that negroes are sometimes selected to serve on juries in his Court. We confidently assert that counsel made no proof, and attempted to make no proof, that negroes were excluded from jury service by the Commissioners; but that, on the other hand, it is most overwhelmingly proved by the only evidence attainable in such a case that negroes are actually drawn on the juries, and that they are not discriminated against on account of race or color.

This Court doubtless feared it might be establishing a dangerous precedent by its decision in the case of Neal vs. Delaware, 103 U. S. 370, in considering an affidavit as proof; but that case is essentially different from this, not only because there was no proof in that case, and there is overwhelming proof in this, but also because this record shows that this accused had every opportunity and every indulgence and every facility extended to him to make out a case, if he had any, while in the Delaware case this Court felt and said that the trial court should have been a little more indulgent. In that case there was a special agreement about a sworn petition for removal being accepted and considered as a separate affidavit in connection with the challenge; and it is evident that this Court considered from that special agreement that it was contemplated by counsel on both sides that these sworn statements should have some weight as evidence, and in its decision this Court gave them the weight which they thought counsel had contem-

plated. And as that was the only evidence on the question, although the affidavit was taken largely not to facts within the knowledge of affiant, it furnished some evidence to support his contention, and there was none on the other side.

If, after the court had overruled that challenge for want of evidence to sustain it, the trial court had granted the request of accused to be allowed the opportunity of proving the discrimination charged, by having sworn as witnesses the officers who had selected the jury, and if the evidence of those officers had not established the discrimination, we feel satisfied that this Court would not have held the *ex parte* affidavit sufficient to establish it. In other words, we feel that that decision was rendered, because this Court thought that the trial court had really cut off the evidence which was attainable, and possibly that counsel for accused had been deceived. In this case, on the other hand, counsel had all the time he wanted and had every facility for producing any evidence attainable, and the jury commissioners were subjected to the most searching examination, and their evidence is most positive and unequivocal, to the effect that they do not exclude negroes from jury service on account of their race or color. As another evidence of the indulgence of the Court, besides allowing counsel to file a challenge to a venire or grand jury long out of existence, and after this, virtually a motion to quash, had been overruled, allowing him to file another motion to quash, which motions could rightfully be made only before arraignment, and the Court allowed all of them after arraignment.

We submit that, while the law does not guarantee to every person accused that he shall be indicted and tried by jurors of his own race, as decided by this Court in 100 U. S., and by the State Supreme Court in 42 A. 255, and 45 A. 903, it is equally impracticable to fix any ratio which must be observed in the number of white and colored men selected for service on juries. Jurors are selected with reference to their qualifications as to competency and intelligence, as to their mental and moral qualifications for the proper discharge of one of the most important duties of citizenship, and not with reference to their race or color. It would lead to the most embarrassing complications, and tend to render uncertain all criminal proceedings, if this Court should undertake, not only to protect and enforce the right of the negro to serve on juries, but also to fix and maintain the ratio which should subsist between whites and blacks in the various courts throughout the numerous counties and parishes in the several states. When the State, through its Constitution, its laws, and the decisions of its Supreme Court, manifests every disposition to respect and carry out the spirit and intention of the 14th amendment and the acts of Congress thereunder, surely the officers of the State can be trusted to exercise the discretion necessarily vested in them in the same spirit.

We therefore assume that this Court will not inquire into or feel concerned about the relative number of whites and blacks who actually serve on juries. But, if it should, the compiled statement furnished by

the Registrar, R. 18, considered with reference to the well known differences between the two races, the higher moral, intellectual and social standing of the white race, and the admission made by the District Attorney and accepted by counsel, R. 5, would show that the proportion of colored men entitled to serve on juries in the City of New Orleans would be quite small. It is a matter within the observation of every well informed man that the number of people in large cities considered eligible for jury service, even among the whites, is relatively small. There are many things to be taken into consideration, in addition to the mere capacity to read and write. The admission referred to shows that the colored voters who sign their names only constitute about two per cent. of the registered vote of New Orleans. This admission may place the proportion too low, but the compiled statement furnished by the Registrar of voters, only shows it to be about nine per cent.

When other things are considered which affect the qualification of a man to serve as a juror, fully as much, if not more, than the mere capacity to sign his name, it is evident that the number of colored men on the juries would necessarily be relatively small. With reference to the proof that there were at least two colored men on the venire from which the grand jury was selected, counsel has somewhere spoken of it as if it was two to a thousand. That is, he assumed that this proof went to show that the names of only two colored men were among the one thousand names which were put in the wheel. As a matter of fact

the proof shows that the names of many colored men were put in that wheel. The proof about the two colored men was, that there were two colored men, and perhaps more, on the venire of seventy-five drawn for service at the October term. That is, the Act of 1894, p. 213, says that not less than seventy-five shall be drawn, and we presume that number was drawn for the October term, although it may have been one hundred.

Although we feel confident that there is no proof in the record which would make it even probable that this court would sustain the contentions of plaintiff in error, yet on account of the grave and disastrous consequences which would result from an interference with the judgment of the State court in this case, consequences which would reach every State and organized community in the Union, we have tried carefully and conscientiously, without misrepresentation, to fairly present all the issues in this case; and we pray that the relief asked for by plaintiff in error be denied.

Respectfully submitted,

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ALEXANDER PORTER MORSE,

Of Counsel.